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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SAM BROWN COMPANY,
Petitioner,

v.

JACOBS MANUFACTURING COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

The questions presented, which this Court left unresolved in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), are now the subject of (1) conflicting decisions among the Courts of Appeals, and (2) an Advisory Committee note to F.R.A.P. Rule 37, 28 U.S.C.A. They are as follows:

1. Whether, upon the reversal of an erroneous judgment n.o.v. (now "JAML") and the issuance of a mandate direcitng entry of a money judgment in accordance with a jury's original verdict, a Court of Appeals must amend its mandate, upon motion timely made by the successful appellant, to include instructions with respect to the allowance of interest.

2. If so, whether the Seventh Amendment and 28 U.S.C., § 1961(a), require that such interest run (1) from the date the original money judgment was entered pursuant to the jury verdict, or (2) only from the date judgment for the identical sum was entered four years later pursuant to the appellate mandate.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Court of Appeals below whose judgment is sought to be reviewed. Petitioner has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals, dated March 28, 1994, is reported at 19 F.3d 1259 and is reprinted in Petitioner's Appendix *infra* (App., pp. 1a-15a).

The Mandate of the Court of Appeals issued on July 28, 1994, filed in the District Court on August 1, 1994, and consisting of a clerk's Judgment dated March 28, 1994, is unreported and is reprinted at page 17a of Petitioner's Appendix. *See* Clerk's explanatory certificate. App., p. 16a.

The Order of the Court of Appeals entered on August 18, 1994, denying Petitioner's motion to amend its Mandate, is unreported and is reprinted at page 18a of Petitioner's Appendix.

The Order of the Court of Appeals entered on September 8, 1994, denying Petitioner's motion for reconsideration of its aforesaid Order of August 18, 1994, is un-

reported and is reprinted at page 19a of Petitioner's Appendix.

Although irrelevant to the questions presented, and therefore not reprinted in Petitioner's Appendix, the Opinion of the District Court dated January 8, 1992, which the Court of Appeals affirmed in part and reversed in part, is reported at 792 F.Supp. 1520.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C., § 1254(1). The Court of Appeals entered and issued its Mandate on July 28, 1994, and thereafter entered its Order denying Petitioner's timely motion to amend its Mandate on August 18, 1994. App., p. 18a. Petitioner seeks a writ of certiorari for this Court to review said Mandate and Order. The Court of Appeals denied Petitioner's petition for rehearing with respect to said Mandate and Order, namely, its timely motion for reconsideration, on September 8, 1994. App., p. 19a. This Petition for a Writ of Certiorari was filed within ninety days thereafter.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

United States Constitution. Seventh Amendment

> . . . [T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

28 U.S.C., § 1961(a). Interest

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

F.R.A.P. Rule 37, 28 U.S.C.A. Interest on Judgments

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

STATEMENT OF THE CASE

In 1984, Respondent Jacobs Manufacturing Company ("Jacobs") sued Petitioner Sam Brown Company ("SBC") on open account. SBC counterclaimed for fraud.[1] Six years later, after a three-week jury trial, SBC's counterclaim was submitted to the jury.

On **September 11, 1990**,[2] the jury found the issues in favor of SBC on its counterclaim and awarded SBC $2,491,792.35 in compensatory damages. It also awarded SBC, because of Jacobs' egregious deceit detailed in the Court of Appeals' opinion, $2.7 million in punitive damages. App., pp. 20a-21a. However, before the case went to the jury, the district judge granted Jacobs' motion for a directed verdict on its claim against SBC for $727,732.82, a money judgment for which was later entered in Jacobs' favor as of that same date, *i.e.*, September 11, 1990.

On **September 12, 1990,** in accordance with the jury's verdict and one day after it was returned, a money judgment was entered in SBC's favor on its counterclaim against Jacobs in the aggregate sum of $5,191,792.35. App., pp. 20a-21a.

Almost sixteen months later, on **January 8, 1992,** the district court granted Jacobs' post-trial motion for judg-

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[1] In the first instance, the basis for federal jurisdiction in the district court was diversity pursuant to 28 U.S.C., § 1332.

[2] Because of their importance to the questions presented, certain dates will appear in bold for the Court's convenience.

ment n.o.v. (now judgment as a matter of law or "JAML") and vacated the jury's verdict in SBC's favor in its entirety. SBC appealed.

More than two years after the district court ruled, and nearly four years after the jury's verdict, on **March 28, 1994,** the Court of Appeals (1) affirmed the directed verdict on Jacobs' claim against SBC but (2) reversed outright the district court's grant of JAML and new trial on SBC's counterclaim, and (3) ordered the district court to enter judgment in favor of SBC "in accordance with the jury's verdict," *i.e.*, the verdict for $5,191,792.35 returned almost four years earlier. App., p. 15a.

On **July 28, 1994,** following the denial of Jacobs' petition for rehearing and its motion to stay the appellate mandate pending a determination by Jacobs whether to seek certiorari, said mandate was issued and sent by letter that same day to the district clerk.[3]

On **August 1, 1994,** the district clerk filed the Court of Appeals' mandate. App., p. 17a. After obtaining a copy of it from the district clerk's office, since the appellate clerk as a matter of Eighth Circuit practice never sends copies to the parties,[4] SBC discovered that, contrary to F.R.A.P. Rule 37, 28 U.S.C.A., it contained no instructions whatever with regard to the allowance of interest. App., p. 17a.

The first sentence of Rule 37 states that "if a judgment for money in a civil case is *affirmed,* whatever interest is allowed by law shall be payable from the date the judg-

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[3] Jacobs did thereafter petition this Court for a writ of certiorari (Case No. 94-653) on an issue unrelated to the questions presented here, which petition was denied on November 7, 1994.

[4] *See,* certification of Michael E. Gans, Eighth Circuit Clerk, who also certified that his Clerk's "Judgment" dated March 28, 1994 (App., p. 16a) did not become the appellate "Mandate" until July 28, 1994, the date that it was issued and sent to the district clerk. App., p. 17a.

ment was entered in the district court."[5] However, the second sentence of Rule 37 then states that "[i]f a judgment is modified or *reversed* with a direction that a judgment for money be entered in the district court," in this instance in accordance with the verdict the jury returned on September 11, 1990, "the mandate *shall* contain instructions with respect to allowance of interest." Italics supplied.

On **August 8, 1994,** mindful of the Appellate Rules Advisory Committee's official note to Rule 37, which addresses the unsettled implications of *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), SBC filed its timely motion with the Court of Appeals to amend its mandate to provide instructions "with respect to the allowance of interest" now that the 1990 jury verdict in SBC's favor, which had been erroneously vacated four years earlier, had been reinstated by the Court of Appeals.

September 12, 1990, the date that SBC's original money judgment was entered pursuant to the jury's verdict, was the date from which SBC moved that postjudgment interest should be allowed. The applicable Treasury Bill rate at the time, pursuant to 28 U.S.C., § 1961(a), was 7.95%. This is the same rate applicable to Jacobs' much smaller original money judgment, entered one day earlier, which the Court of Appeals affirmed.

On **August 18, 1994,** the Court of Appeals, without any explanation whatever, refused to recall its mandate. It simply denied SBC's motion to amend said mandate in a one-line Order. App., p. 18a.

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[5] In so providing, Rule 37 mirrors 28 U.S.C., § 1961(a) [§ 811 at the time of *Briggs*, cited in SBC's statement of the Questions Presented], which provides, "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, . . ." Brackets supplied.

On **August 25, 1994,** just one week later, the District Court entered its Order and concurrent clerk's Judgment reinstating the jury's 1990 verdict for $5,191,792.35. However, because the Court of Appeals had refused to amend its mandate to include instructions regarding the allowance of interest, the District Court had no choice but to direct that interest would only run from that date, **August 25, 1994,** at the current Treasury Bill rate of 5.49% per annum, *not* from **September 12, 1990,** the date that SBC's original money judgment was entered for the same amount, when the rate was 7.95%. App., pp. 22a-24a, 25a-26a.

On **September 8, 1994,** the Court of Appeals also denied SBC's timely motion for reconsideration of its August 18, 1994 Order, again without explanation in a one-sentence Order. App., p. 19a.

By reason of the Court of Appeals Order denying SBC's motion to amend its mandate, and computing from September 12, 1990 through only August 31, 1994, SBC has been deprived of almost $2 million ($1,969,468.52, to be exact) in postjudgment interest.

By contrast, from September 11, 1990 through August 31, 1994, and only because its original judgment for a much smaller sum was *affirmed*, instead of vindicated by *reversal* like SBC's original judgment entered one day later, Jacobs is entitled to $259,474.74 in postjudgment interest.

It is from this Statement of the Case that the questions presented arise, questions that are now the subject of sharply conflicting decisions in different federal Courts of Appeals because they were not resolved by this Court in *Briggs*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A SHARP CONFLICT AMONG THE FEDERAL CIRCUITS WHICH IS THE TROUBLESOME LEGACY OF *BRIGGS v. PENNSYLVANIA R. CO.*, 334 U.S. 304, 68 S. CT. 1039, 92 L.ED. 1403 (1948).

A reading of *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L.Ed. 1403 (1948), will confirm that the questions presented, which have now produced a plethora of conflicting decisions among the federal circuits, were virtually identical to those presented here—with one crucial difference. In *Briggs* they were not preserved below. In this case they were.

It was for this reason only, "[n]o motion to recall and amend the [appellate] mandate [having] been made," that a bare majority concluded in *Briggs*, "Hence the question whether interest might, on proper application, have been allowed, is not reached." *Id.*, 334 U.S. at 305, 307, 68 S. Ct. at 1040, 92 L.Ed. at 1404, 1405.

In *Briggs* a jury verdict was returned for $42,500 and, like here, erroneously vacated. When the trial court was reversed and ordered to enter judgment in accordance with the jury's verdict, again like here, the appellate mandate contained no provision for interest whatever.

Unlike SBC in this case, the plaintiff in *Briggs* filed no motion with the Court of Appeals to amend its mandate to provide instructions with respect to the allowance of interest. Thereafter, the district court simply added interest to the reinstated jury verdict, on the assumption that it was the logical thing to do, from the date it was originally returned.

On appeal to the Second Circuit Court of Appeals, the district court in *Briggs* was reversed. Correctly so, this Court concluded, because, *id.* 234 U.S. at 306, 68 S. Ct. at 1040, 92 L.Ed. at 1405:

> [A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court. . . . The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. *If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But no move to do this was made.* . . . Italics supplied.

Since the plaintiff had failed to preserve the issue, this Court's bare majority declined to resolve in *Briggs*, over the dissent of Justice Rutledge writing for the minority, the equally important further questions that SBC *did* preserve here. Specifically, since *Briggs* held that interest is not *implicitly* included in an appellate mandate, the unresolved questions remain whether a Court of Appeals *must*, upon timely motion to amend, *explicitly* provide for the allowance of interest and, if so, whether such interest runs from (1) the date of the original money judgment entered pursuant to the jury verdict that was erroneously vacated, or (2) "only from the time of entering judgment after receipt of the appellate court's mandate." *Briggs*, 234 U.S. at 307-309, 68 S. Ct. at 1041, 92 L.Ed. at 1406 (Rutledge, J., dissenting).

The *Briggs* minority deplored the Court's failure to resolve these important questions because, absent such resolution, they were bound to generate future controversy. And so they have. As discussed in Section III *infra*, the date from which interest is to be calculated is now the subject of sharply conflicting decisions, not to mention a heated division of opinion among circuit judges themselves, in different Courts of Appeals. In the interest of assuring future uniformity and providing needed guidance, this alone provides sufficient reason for this Court to resolve the important questions presented.

Absent a definitive resolution, there will remain a potential for injustice in every case where, like here, (1) an erroneous JAML is reversed outright, (2) a jury's verdict

is reinstated years later after a protracted appeal, and (3) an appellate mandate is issued, one mute with regard to interest, directing entry of judgment for a sum identical to the sum in the successful appellant's original money judgment that never should have been vacated in the first place.

II. BECAUSE THE QUESTIONS PRESENTED WERE NOT DECIDED IN *BRIGGS*, THERE IS AN OFFICIAL ADVISORY COMMITTEE NOTE TO F.R.A.P. RULE 37, 28 U.S.C.A., REMINDING ALL COURTS OF APPEALS, THEIR CLERKS AND COUNSEL OF THE SERIOUS PROBLEM REGARDING POST-JUDGMENT INTEREST. IN ORDER TO AVOID INJUSTICE AND PROVIDE GUIDANCE, THIS COURT SHOULD NOW RESOLVE THE POST-JUDGMENT INTEREST PROBLEM.

It is noteworthy that there is an official Advisory Committee note to F.R.A.P. Rule 37, 28 U.S.C.A., that addresses the troublesome legacy of *Briggs* and cautions that:

> Since the [*Briggs*] rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, *a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.* Italics supplied.

This is precisely what SBC tried to do. Without explanation, the Court of Appeals simply denied SBC's motion to amend its mandate in a one-line Order. App., p. 18a.

Ironically, because of this Court's ruling in *Briggs* and its bare majority's failure to resolve the questions now presented, SBC finds itself stripped by a one-line Order, no reason given, of almost $2 million in interest. SBC is firmly convinced, however, that it is entitled to such interest not only pursuant to 28 U.S.C., § 1961(a), but more

importantly, as a mater of Constitutional right under the Seventh Amendment.

Absent this Court's willingness to resolve the conflict among the federal circuits in SBC's favor, the integrity of SBC's 1990 jury verdict will be demeaned and its value diminished. Jacobs will receive an unconscionable windfall, specifically, the interest-free use of SBC's $5.2 million that should have been paid four years ago, after the jury returned its verdict, pursuant to SBC's original money judgment that was erroneously vacated.

Absent the Court's intervention, this will occur because:

1. Although 28 U.S.C., § 1961(a), states "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court . . . [and] shall be calculated from the date of the entry of the judgment," the questions left unanswered in *Briggs* make it uncertain which judgment is referred to, (1) SBC's original money judgment entered on September 12, 1990 (App., p. 20a) that was vindicated on appeal by the outright reversal of the trial court, or (2) the judgment entered four years later for the identical sum on August 25, 1994, pursuant to the appellate mandate (App., pp. 25a-26a).

2. Only if an original money judgment is *affirmed* is the answer clear, *viz., "if a judgment for money in a civil case is affirmed,* whatever interest is allowed shall be payable from the date the judgment was entered. . . ." F.R.A.P. Rule 37, 28 U.S.C.A. Thus, the date is September 11, 1990, in the case of Jacobs' original money judgment.

3. "*If a judgment is modified or reversed,*" in this instance the trial court's erroneous judgment n.o.v. (now "JAML") vacating SBC's original money judgment entered on September 12, 1990, "the mandate *shall* contain instructions with respect to the allowance of interest." F.R.A.P. Rule 37, *supra.* However, the mandate here contained no such instructions at all.

4. Absent such instructions, and as a consequence of *Briggs* and its failure to resolve the questions presented, the inclusion of interest from the date of SBC's original money judgment cannot be inferred. This is why the Advisory Committee in its warning and note to F.R.A.P. Rule 37, *supra,* stated that "a party who conceives himself entitled to [such] interest . . . *should be entitled to seek recall of the mandate for determination of the question.*"

5. SBC did exactly what the Advisory Committee cautioned it to do. The Court of Appeals, however, denied SBC's timely motion to amend is mandate without explanation.

Paradoxically, Jacobs will therefore receive the unconscionable interest-free use for four years of the $5.2 million that the jury awarded SBC. To add insult to injury, and only because its own money judgment for a much smaller sum was *affirmed* rather than vindicated by an outright *reversal,* Jacobs will also receive for the same four years over a quarter of a million dollars in interest on that judgment.

Only this Court, by addressing the unsettled legacy of *Briggs* and resolving the conflict among the circuits discussed *infra,* can extricate SBC from such a "Catch-22" and prevent the same injustice from recurring in the future.[6]

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[6] The flyleaf to Joseph Heller's classic could not put it better. "Catch-22: It's a legal loophole that means just when you're sure you've won, . . . you lose!" *Catch-22,* J. Heller, Dell Publishing Co., Inc., 1985 Edition.

III. THERE ARE SHARPLY CONFLICTING DECISIONS AMONG THE DIFFERENT COURTS OF APPEALS WHETHER INTEREST RUNS FROM (1) THE DATE OF AN ORIGINAL MONEY JUDGMENT ENTERED PURSUANT TO A JURY VERDICT ERRONEOUSLY VACATED, OR (2) THE DATE OF A LATER MONEY JUDGMENT FOR THE SAME AMOUNT ENTERED PURSUANT TO AN APPELLATE MANDATE REVERSING THE TRIAL COURT AND REINSTATING THE JURY VERDICT.

Briggs left unanswered a fundamental question, namely, from what date does interest run where a jury verdict that was erroneously vacated by a District Court is reinstated many years later by a Court of Appeals?

That question is now the subject of sharply conflicting decisions in different Courts of Appeals, just as the *Briggs* minority predicted it would be.[7]

Specifically, the position of the Eleventh Circuit, the First Circuit, the Seventh Circuit and, until now, the Eighth Circuit, is stated in *DeLong Equipment v. Washington Mills Electro,* 997 F.2d 1340 (11th Cir. 1993), cert. denied 510 U.S. ——, 114 S.Ct. 604, 126 L.Ed.2d 569 (on an unrelated issue); *Cordero v. De Jesus-Mendez,* 922 F.2d 11 (1st Cir. 1990); *Graefenhain v. Pabst Brewing Co.,* 870 F.2d 1198 (7th Cir. 1989); and *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985). That unequivocal position is that where a judgment n.o.v. ("JAML")

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[7] "[Petitioner] seeks as of right interest given by § 811 [now 28 U.S.C., § 1961(a)]. . . . The extent to which the section gives interest is, of course, a distinct question, depending in this case on whether the section contemplates that the interest shall begin to run at one date or another. . . . The question is of considerable importance for the proper and uniform administration of the statute; . . . the uncertainty as well as the conflict of decisions should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants. *Briggs,* 334 U.S. at 313-314, 68 S. Ct. at 1043-1044, 92 L.Ed. 1408-1409 (Rutledge, J., dissenting).

is reversed outright and a jury verdict is reinstated in full, postjudgment interest runs as a matter of law from the date that the original money judgment was entered pursuant to the jury verdict, *not* from the date of the subsequent money judgment for the identical sum entered years later pursuant to the appellate mandate.

A diametrical opposite point of view is shared by the Fifth Circuit and Second Circuit, one stated in *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986); and *Smith v. National R.R. Passenger Corp.,* 856 F.2d 467 (2d Cir. 1988). That position is that, notwithstanding the above circumstances, it is not required that postjudgment interest run from the earlier date but only from whatever date the Court of Appeals deems equitable, including the latter date, as determined on a case-by-case basis.

In *DeLong Equipment v. Washington Mills Electro, supra,* 997 F.2d 1340, only last year the Eleventh Circuit reinstated an erroneously vacated jury verdict awarding damages for fraud and antitrust damages that were trebled. As here, the appellate mandate was completely silent regarding the allowance of postjudgment interest.

Just as SBC did, the plaintiff in *DeLong* moved that the Court of Appeals amend its mandate to include interest from the date of the original money judgment. Unlike the Eighth Circuit in the instant case, which ignored F.R.A.P. Rule 37 by refusing without explanation to amend its mandate, the Eleventh Circuit Court of Appeals did amend its mandate to explicitly provide for such interest.

After tracing the history of the so-called *Briggs* default rule and the interest problem left unresolved by *Briggs,* the Eleventh Circuit noted that Rule 37 itself "does not aid an appellate court in determining how to instruct a district court on the award of postjudgment interest." *DeLong,* 997 F.2d at 1341. It concluded, however, *id.* at 1342:

> In cases such as this one, which reinstate a jury verdict for the plaintiff, we think that equity ordinarily, *and perhaps always,* commands that interest be awarded from the date of the original judgment. There are several reasons for this. First, and most important, it is necessary to protect the integrity of the jury verdict. . . . *We think DeLong might have a serious Seventh Amendment claim if we were to rule otherwise.*
>
> Secondly, we note that [the defendant] has been able to put the $6 million to use . . . for nearly three years since a jury found [for the plaintiff]. . . . That the district court erroneously set aside the earlier judgment should not result in a transfer of wealth from [the defendant] to its victim, DeLong. In short, the flip side of the potential windfall to [the defendant] would be a penalty to DeLong: as the First Circuit stated in a similar case, '[c]alculating interest from the date of the second judgment would penalize [the plaintiff] for the trial judge's error.'

Italics and some brackets supplied.

After citing *Cordero v. De Jesus-Mendez, supra,* 922 F.2d 11, confirming that the First Circuit shares the same point of view, the Eleventh Circuit in *DeLong* flatly rejected the contrary view of the Fifth Circuit in *Affiliated Capital Corp. v. City of Houston, supra,* 793 F.2d 706, because "[a]ny other rule would interfere with the right to jury trial by effectively reducing the jury award without a holding that the jury granted an inappropriate figure." *DeLong,* 997 F.2d at 1343.[8]

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[8] The Eleventh Circuit noted, citing *Woods Exploration & Producing Co. v. Aluminum Co. of Am.,* 508 F.2d 784 (5th Cir. 1975), that the Fifth Circuit, before later changing its mind, had previously agreed with the Eleventh Circuit's position. *DeLong,* 997 F.2d at 1342. It also noted that its reading of *Kaiser Alum. and Chem. Corp. v. Bonjorno,* 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d

The Seventh Circuit came to the same conclusion in *Graefenhain v. Pabst Brewing Co., supra,* 870 F.2d at 1211, holding that "unless the mandate of the appellate court alters the original judgment in more than relatively minor respects, interest should attach from the date of the pre-appeal judgment. . . . Since our prior opinion reinstated the jury's verdict, this rule should apply to the present case."

In *Affiliated Capital Corp. v. City of Houston, supra,* 793 F.2d 706, cited and rejected in *DeLong,* the Fifth Circuit came to an opposite conclusion. A sharply divided court, upon motion of the successful appellant to amend its mandate to provide instructions regarding interest, acknowledged that decisions in the Eighth and Ninth Circuits [9] supported the plaintiff's claim that it was entitled to interest "from at least the date of the district court's erroneous judgment n.o.v. . . ." *Id.*, 793 F.2d at 708. It also acknowledged that the date from which interest runs is "still [an] unsettled area of the law." *Id.* at 708. The *Affiliated* majority concluded, however, that although the plaintiff won on appeal and the jury verdict was reinstated, its reading of § 1961 and Rule 37 does not require a court of appeals to direct that interest run from any fixed date because "[s]uch a 'rule' ignores the fact that 'equities' vary from case to case." *Id.* at 710.

As for the "equities" in *Affiliated,* the Fifth Circuit majority concluded, "Affiliated's victory was far from clear-cut," and besides, it was not going to go "uncompensated for the loss of value on its money judgment" because its jury award for antitrust damages would be trebled anyway. *Id.* at 711-712. Interest was therefore

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842 (1990), although different issues were involved, supports its belief that the Eleventh Circuit view is the right one, not the current Fifth Circuit view. *Id.* at 1342 n.1.

[9] *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985), and *Turner v. Japan Lines, Ltd.,* 702 F.2d 752 (9th Cir. 1983).

allowed only from the date of judgment entered pursuant to the appellate mandate.

The *Affiliated* minority sharply disagreed, reminding the majority, *id.* at 713-714:

> But for the erroneous ruling of the District Court, the plaintiff would have had the use of the money awarded by the jury's verdict. . . . The 'equity' done by the majority penalizes the victorious plaintiff for the District Court's error, and gives the defendant a windfall. . . . Considering the functions of interest, it hardly seems significant, in equity or otherwise, that the case was close, involved difficult issues, or engendered a vigorous dissent. . . . A win, whether by four touchdowns or a last second field goal, is a win.

Unlike the First Circuit, the Seventh Circuit, the Eleventh Circuit and the Fifth Circuit's minority, the Second Circuit agrees with the Fifth Circuit's majority, holding in *Smith v. National R.R. Passenger Corp., supra,* 856 F.2d 467, that although such interest in the second Circuit used to run from the date of judgment entered pursuant to the appellate mandate, now the date will be determined on a case-by-case basis depending on the equities. In *Smith, id.* at 473, and only because the "equities" so dictated, the Second Circuit held that date to be the same date that judgment was originally entered pursuant to the jury verdict.

Based on its unexplained refusal to amend its mandate here, what opposing camp the Eighth Circuit belongs to is uncertain. Until now, it appeared to subscribe to the First, Seventh and Eleventh Circuits' school of thought. In *Buck v. Burton, supra,* 768 F.2d 285, after noting it had not previously ruled on the issue, the Eighth Circuit concluded that the successful appellant should receive interest on the loss of the use of its money judgment "from the date damages were ascertained—that is, the date upon which plaintiff's original judgment should have

been entered had the district court not erroneously granted judgment n.o.v." *Id.* at 287.

Since the Eighth Circuit denied SBC's motion to provide instructions regarding interest, as well as SBC's motion for reconsideration in which SBC reminded the court of its previous ruling in *Buck*, we can only assume either the Eighth Circuit is now uncertain what its position should be or has elected for some undisclosed reason simply to ignore § 1961(a) and Rule 37. This further underscores the importance of granting certiorari in this case. As Justice Rutledge recognized in *Briggs*, the prime responsibility for the proper functioning of the federal judiciary, when it comes to procedural issues of this magnitude, rests obviously with this Court.[10]

It is thus apparent, based on the above survey of the reported cases, that a sharp conflict in decisions exists between different Courts of Appeals, not to mention a heated difference of opinion among circuit judges themselves. Perhaps the chaotic situation is best summarized by the First Circuit, which observed in *Clifford v. M/V Islander*, 882 F.2d 12, 13-14 (1st Cir. 1989):

> [S]ection 1961(a) provides that postjudgment "interest shall be calculated from the date of the entry of the judgment." This deceptively straightforward language has led federal judges to a plethora of conflicting conclusions. In cases where a judgment for money damages was entered, then later vacated, then eventually supplanted by a second dollar judgment (in whatever amount) the circuits are in great disarray as to when the postjudgment interest meter clicks into the "ON" position.

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[10] In this regard, Circuit Judge Brown's statement in *Affiliated Capital Corp. v. City of Houston, supra*, 793 F.2d at 713, is both noteworthy and relevant. He acknowledged that "[a]lthough I am the first to recognize that issuance of the mandate is essentially ministerial by the Clerk so that no judge was responsible for this mistake, the error was nevertheless ours. However it happened, this is hardly an equity against the ultimate victor."

It was the expressed hope of the First Circuit in *Clifford, id.* at 14, that the matter would be resolved by this Court in *Kaiser Alum. and Chem. Corp. v. Bonjorno,* 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990), where certiorari had just been granted. Regrettably, that did not happen. Instead, "disarray" among the circuits persists.

Given the troublesome legacy of *Briggs,* which continues unabated to confound this recurring aspect of appellate practice, it is time for this Court to resolve the conflict and provide needed future guidance.

CONCLUSION

Because of the importance of the questions presented, and for all of the reasons stated, SBC's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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December 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834WM

THE JACOBS MANUFACTURING COMPANY,
Appellee,

v.

SAM BROWN CO.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: December 17, 1992

Filed: March 28, 1994

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

FAGG, Circuit Judge.

This lawsuit arises from the breakdown of a distributor relationship between the Jacobs Manufacturing Company (Jacobs), a manufacturer of truck engine brakes, and Sam Brown Company (Brown), its largest distributor. After the relationship ended, Jacobs brought this diversity action for its unpaid account balance, and Brown counterclaimed asserting Jacobs made fraudulent and

negligent misrepresentations. Brown appeals the district court's order granting judgment as a matter of law (JAML) to Jacobs. We affirm in part and reverse in part.

I.

In 1976 Jacobs's representatives approached Brown's chief executive officer (CEO) to solicit Brown as a Jacobs distributor. Brown's CEO expressed concern about the distributorship agreement's one-year term and Jacobs's right to sell directly to original equipment manufacturers. The representatives responded the agreement would last a "lifetime" if Brown performed well, the only original equipment manufacturer integrating Jacobs's products in Brown's territory would be Brown's account, and Jacobs would refer to Brown all original equipment manufacturer inquiries from Brown's exclusive territory. Assured this oral understanding was also part of the agreement, Brown's CEO signed the annual distributorship agreement. Brown became Jacobs's top distributor in North America. Each year after 1976, Jacobs sent Brown a new agreement with a letter from Jacobs's general sales manager stating that he was "sure [their] continued association [would] be long term and mutually beneficial." Brown signed the agreements each year until 1984. Jacobs repeatedly reassured Brown it would be a long-term distributor and promised to inform Brown about any developments affecting Brown's distributorship and expansion effort. With borrowed money, Brown invested more than one million dollars in developing its Jacobs distributorship to comply with Jacobs request that Brown have suitable physical facilities and trained service personnel available around the clock.

Contrary to its representations to Brown, Jacobs was considering changes to its distribution system. As early as 1974, Jacobs's five-year marketing plan called for an analysis of the advantages of directly marketing and servicing its products. In 1979, Jacobs hired a consultant

to develop alternative distribution plans. Without disclosing this purpose, Jacobs's vice president asked Brown to give the consultant unlimited access to Brown's premises and business records. The vice president told Brown the reason for the consultant's visit was to allow the consultant to find out how a Jacobs distributor operated. With Brown's cooperation, the consultant obtained knowledge of Brown's production and marketing practices and other confidential information, but assured Brown the information would not be disclosed.

Later, in June 1981, Jacobs received a commissioned report from a different consulting firm, Bain and Company. The Bain report stated that "[w]ith a very carefully staged, time-phased program, Jacobs could gradually eliminate almost all of the distributors." The Bain report recommended that Jacobs pursue the fleet program, eliminate the original equipment manufacturer distributor segment first, bring the distributor role in-house, and fully eliminate all external distributor segments by 1984. The report warned that to avoid loss of sales, goodwill, and image, distributors would have to be kept in place until Jacobs had its own direct sales system ready. A few days afer receiving the Bain report, Jacobs executives studied the report at a hotel.

In July 1981, a month after receiving the Bain report, Jacobs encouraged Brown to continue financially supporting its Jacobs distributorship through a trucking industry recession that began in May 1980, promising Brown would be rewarded by future business when the recession ended. Jacobs's regional representative also assured Brown that their relationship was "like a marriage" and the distributorship would "go on and on." In September 1981, however, Jacobs's in-house counsel sent a written inquiry to a Jacobs executive asking whether Jacobs was "still considering a change in its distribution system [that] will enable Jacobs to go direct and eliminate all distributors and middlemen."

Behind its false front of assurances to Brown, Jacobs began to implement the Bain report's recommendations. In 1982 Jacobs started a program of direct sales to Brown's truck fleet customers. After Brown sent Jacobs a letter complaining about the program, Jacobs responded that the new program was merely a special promotion. Jacobs reassured Brown that Jacobs's short-range and long-range marketing strategies were not affected and that distributors would continue as the backbone of Jacobs's sales effort. Despite its assurances, however, Jacobs was analyzing a "Single Price Strategy" under which Jacobs would sell its products directly to any customer at the same price Jacobs charged its distributors, destroying the value of the distributorships. Nonetheless, Jacobs continued to urge Brown to maintain its distribution efforts through the recession, claiming both companies would benefit when the market rebounded. Jacobs's general sales manager admitted he knew about the Bain report and that Jacobs was considering changing its basic method of distribution as early as 1974, but never disclosed this information to Brown.

Consistent with the Bain report, when the recession ended in 1983 Jacobs unveiled its "Single Price Strategy," which Jacobs implemented by changing the annual distributorship agreements. Jacobs informed Brown in September 1983 that effective January 1, 1984, Jacobs would accept direct orders from original equipment manufacturers at the same prices offered to distributors, eliminate the distributors' exclusive territories, and reserve the right to sell directly to anyone at one price. Jacobs expanded its own sales and service force and in November 1983 directly solicited Brown's original equipment manufacturer and truck fleet customers, which together constituted 90% of Brown's customers for Jacobs's brakes. Jacobs fully realized the consequences of the distribution changes: Jacobs's 1983 Eastern Regional Annual Report declared, "[Jacobs's] announcement . . . of the 1984

Single Price Strategy irrevocably has changed the traditional role of our distributors. [They] must either change or die. Most will probably die."

In December 1983 Brown sent Jacobs a letter complaining that Jacobs's new policy would effectively destroy Brown's distributorship, and reminding Jacobs that Brown had incurred heavy losses during the recession based on Jacobs's assurances Brown would benefit when the market improved. Brown also stated it would be unable to recover the one million dollars it had invested in facilities and marketing for Jacobs's brakes. Jacobs did not respond to Brown's letter in writing, but a Jacobs manager noted on the letter that Jacobs should send "someone with rapport [to] visit [Brown's CEO and] give him a crumb." Because Brown could not profitably sell Jacobs's products to customers who could buy directly from Jacobs at the same price, Brown refused to sign Jacobs's 1984 distributorship agreement.

II.

Jacobs filed this diversity action against Brown for the unpaid account balance owing for products sold to Brown when the distributor relationship ended. Brown denied liability and counterclaimed, alleging Jacobs made several fraudulent misrepresentations; (1) Jacobs's statements in and after 1976 that it was not considering any plans to change its existing distribution method; (2) Jacobs's assurance in July 1981 that it had no plans to change its existing distribution method; and (3) Jacobs's statements in and after July 1981 that, if Brown remained a Jacobs distributor during the market recession, Brown's distributorship would continue when the market rebounded. Following a fifteen-day trial, the district court granted Jacobs's JAML motion on its claim against Brown, and submitted Brown's counterclaims to the jury. The jury found all three Jacobs representations were fraudulent and the third representation was also neg-

ligent. The jury awarded Brown almost $2.5 million in actual damages, consisting of out-of-pocket losses and lost future profits, and $2.7 million in punitive damages.

Sixteen months after the jury returned its verdict, the district court granted Jacobs's renewed JAML motion on Brown's counterclaims. *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992). Without the benefit of the trial transcript, the district court concluded there was no evidence from which the jury could reasonably infer that the second and third representations were false when made, *id.* at 1526, and as a matter of law, Brown could not justifiably rely on any of Jacobs's representations, *id.* at 1527. The district court vacated Brown's damage award for lost future profits, finding the profits were not proximately caused by Jacobs's first misrepresentation. *Id.* at 1530. The district court also vacated the punitive damages award, deciding the jury instruction violated due process because it did not adequately guide the jury in determining the amount of punitive damages, *id.* at 1536, the evidence did not support the award, *id.* at 1537, and the award resulted from irrational jury behavior, *id.* The district court also granted Jacobs's alternative motion for a new trial on Brown's counterclaims. *Id.* at 1539-40.

III.

Brown contends the district court erroneously granted Jacobs's JAML motion on Brown's fraudulent misrepresentation counterclaims. To establish fraudulent misrepresentation, Brown had to show, among other things, that Jacobs's representations were false when made and that Brown had a right to rely on the representations. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148-49 (8th Cir. 1984) (applying Missouri law); *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 549 (Mo. Ct. App. 1983). Brown contends that, contrary to the district court's view, the evidence supports the jury's findings that Jacobs's second

and third representations were false when made and that Brown justifiably relied on all three representations. We agree.

In reviewing the district court's grant of JAML, we apply the same standard that governed the district court. *See Estwick v. City of Omaha,* 9 F.3d 56, 59 (8th Cir. 1993). We consider the evidence and the reasonable inferences that may be drawn from the evidence in the light most favorable to Brown. *First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Co.,* 2 F.3d 801, 808 (8th Cir. 1993). JAML should not have been granted unless all the evidence points one way and is susceptible of no reasonable inferences sustaining Brown's position. *Id.* at 808-09. The standard of review for JAML is the same under Missouri and federal law. *Sutherland v. Elpower Corp.,* 923 F.2d 1285, 1288 n.6 (8th Cir. 1991).

Under Missouri law, fraud may be inferred from facts and circumstances and need not be shown by direct evidence. *Glass Design Imports, Inc. v. Import Specialties,* 867 F.2d 1139, 1142 (8th Cir. 1989); *Essex,* 661 S.W.2d at 551. Whether the facts and circumstances justify a conclusion that a defendant knows a representation is false when made is a question for the jury. *Essex,* 661 S.W.2d at 551. When a fraudulent misrepresentation claim is based on a statement of intent, the plaintiff establishes falsity by showing that when the speaker made the statement, the speaker did not intend to perform consistently with the statement. *See Craft v. Metromedia, Inc.,* 766 F.2d 1205, 1218-19 (8th Cir. 1985) (applying Missouri law), *cert. denied,* 475 U.S. 1058 (1986). Although intent not to perform cannot be shown solely by the speaker's nonperformance, intent can be shown by other evidence. *Id.* at 1219.

In our view, a rational jury could find the second and third representations were false when made. This is so because, viewing the evidence in the light most favorable

to Brown, the jury could reasonably infer Jacobs had decided to eliminate external distributors when it made these statements to Brown. Before 1981, Jacobs concealed distribution studies and deceived Brown about the purpose of a consultant's visit. The June 1981 Bain report recommended a carefully staged, time-phased program to eliminate Jacobs's distributors by 1984. Jacobs's later conduct and timing neatly coincided with the Bain report's recommendations. We believe the jury could reasonably infer that in June 1981 Jacobs secretly adopted the Bain report's recommendation to eliminate the traditional distributors. Thus, a reasonable jury could find the second representation—Jacobs's assurances in and after July 1981 that it had no plans to change its distribution system—was untrue when made. A reasonable jury could also find that when Jacobs made the third representation, Jacobs did not intend that Brown would benefit from increased sales after the recession's end.

This leaves the issue of Brown's reliance on the three representations. Evidence that Brown continued to incur expenses to maintain its distributorship until Jacobs announced the changes in the distributorship agreement shows Brown relied on Jacobs's representations. *See Total Petroleum, Inc. v. Davis,* 788 F.2d 476, 481-82 (8th Cir. 1986) (applying Missouri law). A rational jury could also find that Brown's reliance was justified. The district court held that even assuming all three representations were false, Brown's reliance on the verbal representations was not justified as a matter of law because the verbal representations conflicted with the express terms of the written distributorship agreements. *See* 792 F. Supp. at 1526-27. This view is unsupported by Missouri law, however.

In a Missouri fraud case, it is for the jury to decide whether a party is entitled to rely on verbal representations that conflict with a written agreement. *Pinken v. Frank,* 704 F.2d 1019, 1024-26 (8th Cir. 1983); *Essex,*

661 S.W.2d at 550. Thus, Brown's reliance on Jacobs's verbal representations could be justified, even though the verbal representations contradicted the distributorship agreements' one-year terms and reservation to Jacobs of the right to sell directly to original equipment manufacturers. Although Brown also knew Jacobs was selling products directly to Brown's truck fleet customers, Brown could justifiably rely on Jacobs's assurances that the program was temporary and Jacobs's distributors would continue as the backbone of Jacobs's sales effort. It was for the jury to decide whether Brown's reliance on Jacobs's verbal representations was justified. *See Pinken,* 704 F.2d at 1024.

Because the jury's finding that all three representations were fraudulent supports the damages awarded, we need not consider whether Brown's negligent misrepresentation counterclaim was properly submitted to the jury.

IV.

Brown next contends the district court should not have vacated the award for lost future profits. We agree. The district court held damages for Brown's lost future profits, i.e., "benefit of the bargain" damages, were proper under Missouri law. 792 F. Supp. at 1528-29; *see Glass Design,* 867 F.2d at 1143; *Central Microfilm Serv. Corp. v. Basic/Four Corp.,* 688 F.2d 1206, 1220 (8th Cir. 1982), *cert. denied,* 459 U.S. 1204 (1983). The district court also held the future profits were not speculative. 792 F. Supp. at 1529; *see Riddle v. Dean Mach. Co.,* 564 S.W.2d 238, 257 (Mo. Ct. App. 1978). We agree with the district court's assessment of Missouri law, and Jacobs does not assert on appeal that lost future profits are not a proper measure of damages or that future profits were speculative. The district court concluded, however, that a reasonable jury could not have found the first representation proximately caused the loss of future profits, essentially because the district court viewed Brown's re-

liance on Jacobs's verbal representations as unjustified. 792 F. Supp. at 1530. Having already concluded there was no evidence that the second and third representations were false when made, the district court did not consider whether they proximately caused Brown's loss of future profits. *See id.*

We believe a reasonable jury could find that Brown's loss of future profits was a direct result of Jacobs's fraudulent misrepresentations. As we have already explained, a reasonable jury could conclude that the second and third representations were false when made and that Brown's reliance on Jacobs's verbal representations was justified. Jacobs argues Brown's refusal to sign the 1984 distributorship agreement caused Brown's loss of future profits. This argument is misplaced. In the context of fraud, the purpose of "benefit of the bargain" damages is to compensate a defrauded party for amounts that would have been received if the situation had been as the defrauding party represented. *See Smith v. Tracy,* 372 S.W.2d 925, 938 (Mo. 1963). Here, these damages compensate Brown for the money it would have made after the market recession ended if its distributorship had continued without change as Jacobs represented, i.e., without Jacobs's direct competition. It is clear to us that Brown's loss of future profits was a direct result of Jacobs's new distribution system, which prevented Brown from profiting from future business as Jacobs had promised Brown would. Although Brown refused to sign the distributorship agreement in 1984, Brown could not have profited even if it had signed the agreement because Jacobs's distribution changes eliminated Brown's ability to make any money. We conclude the district court abused its discretion in vacating the damages awarded for lost future profits.

Brown also challenges the district court's order vacating the punitive damage award. The district court instructed the jury that if it found Jacobs committed fraud

with "evil motive or reckless indifference to [Brown's] rights . . . , [y]ou may award [Brown] an additional amount as punitive damages to punish [Jacobs] and to deter [Jacobs] and others from like conduct." Disagreeing with the Missouri Supreme Court's decision in *Burnett v. Griffith,* 769 S.W.2d 780, 789 (Mo. 1989) (en banc), the district court concluded this instruction did not satisfy due process because it failed to guide the jury on determining the amount of any punitive damage award. 792 F. Supp. at 1533-35. Specifically, the district court held the instruction failed to tell the jury that the amount of a punitive damage award must be reasonably related to the injury inflicted and the conduct that caused the injury. *Id.*

Missouri case law identifies many factors, including the existence of a reasonable relationship between the amount of punitive damages awarded and the injury inflicted, that restrict a jury's punitive damage decision. *Carpenter v. Chrysler Corp.,* 853 S.W.2d 346, 365-66 (Mo. Ct. App. 1993). We believe the district court was simply mistaken in holding the instruction itself must contain the limiting factors. Rather, trial or appellate court review based on the identified factors "imposes a sufficiently definite and meaningful constraint on the [jury's discretion] in awarding punitive damages" to satisfy due process. *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22 (1991); *see Carpenter,* 853 S.W.2d at 365-66. Having carefully reviewed the record, we conclude the jury's punitive damage award bears a reasonable relationship to Brown's injury. *See Finley v. Empiregas, Inc.,* 975 F.2d 467, 472 (8th Cir. 1992) (applying Missouri law). We thus conclude the jury did not abuse its discretion in fixing the amount of punitive damages. *See id.*; *Carpenter,* 853 S.W.2d at 365.

Based on its analysis of Brown's reliance on Jacobs's verbal representations, the district court also concluded the punitive damage issue should not have been submitted to the jury. 792 F. Supp. at 1537. Again wrongly reject-

ing Brown's reliance on verbal representations inconsistent with the written terms of the distributorship agreement, *see ante* at 8, the district court held a reasonable person viewing the evidence could not find Jacobs acted with reckless disregard. *Id.* Construed in the light most favorable to Brown, however, the evidence supports the jury's punitive damage award. Brown's claim for fraudulent misrepresentation was properly submitted to the jury, and the jury reasonably could find Jacobs acted in reckless disregard of Brown's rights.

The district court also held the amount of the punitive damage award was so unrealistic that it showed irrational rather than reasonable jury behavior. *Id.* Considering Jacobs's net worth of over $51 million, Brown's actual damages of nearly $2.5 million, and the continuous nature and magnitude of Jacobs's deceit, however, the $2.7 million punitive damage award is not so excessive or unreasonable that it shocks our constitutional sensibilities or could only have resulted from irrational jury behavior. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722-23 (1993) (affirming $10 million punitive damage award when actual damages were $19,000).

V.

Brown also contends the district court should not have granted Jacobs's JAML motion on Jacobs's claim for the unpaid account balance because Brown's equitable estoppel defense should have been submitted to the jury. We disagree. Because Brown failed to plead the affirmative defense of estoppel, Brown waived it. *Ronollo v. Jacobs*, 775 S.W.2d 121, 124 (Mo. 1989) (en banc). The district court thus properly granted Jacobs's JAML motion on Jacobs's claim.

VI.

Having decided the district court erroneously granted JAML on the liability issue, we must also consider the district court's conditional grant of a new trial. 792 F.

Supp. at 1539-40. The district court held Jacobs is entitled to a new trial on the third representation because the verdicts of fraud and negligence were inconsistent. *Id.* We agree with Brown that Jacobs waived the right to a new trial based on inconsistent verdicts, and failed to preserve the issue for our review, when Jacobs failed to object and move for resubmission before the jury's discharge. *Brode v. Cohn,* 966 F.2d 1237, 1239 (8th Cir. 1992). In any event, because the first and second representations were properly submitted to the jury on the fraud theory alone and these representations support the jury's awards of compensatory and punitive damages, any inconsistency with respect to the third representation was harmless error.

The district court also granted a new trial on the ground the punitive damages award was not supported by "substantial evidence." 792 F. Supp. at 1539. Although this is an imprecise statement of the evidentiary standard for granting a new trial, the district court also correctly stated it could disturb the jury's verdict only if the verdict was against the "great weight" of the evidence, so that granting a new trial would prevent a miscarriage of justice. *Id.*; *see White v. Pence,* 961 F.2d 776, 780-81 (8th Cir. 1992). Instead of explaining reasons for concluding a new trial should be granted on the weight of the evidence, *Pence,* 961 F.2d at 781-82, however, the district court merely stated, "For all of the reasons previously discussed, there was not substantial evidence supporting the award of punitive damages," 792 F. Supp. at 1539.

Because the "previously discussed" reasons could only refer to the district court's analysis of the evidentiary basis for the punitive damages award when considering Jacobs's motion for JAML, *see id.* at 1536-37, it is less than clear that the district court applied the new trial standard rather than the JAML standard in granting Jacobs a new trial. If the district court applied the JAML standard, the court could not grant a new trial because

"[JAML] principles have no application to the consideration of a motion for new trial on the ground that the verdict is against the weight of the evidence." *Pence,* 961 F.2d at 779. Regardless of whether the district court considered its earlier analysis of the evidence under the JAML standard or the new trial standard, however, the evidentiary analysis was infected by the district court's legally incorrect view that Brown could not justifiably believe Jacobs's verbal representations over the written agreement's terms, *see* 792 F. Supp. at 1537, as we have already pointed out, *ante* at 8, 11. Further, if the district court used the new trial standard, the court misapplied it. The district court did not properly weigh Brown's testimony about Jacobs's verbal representations, find Brown's testimony unworthy of belief, or find a significant weight factor favoring Jacobs. *See Pence,* 961 F.2d at 781. Rather, because Brown's testimony was at odds with the written agreements, the district court concluded that "a reasonable jury could not fairly conclude [Jacobs's] conduct was either outrageous or . . . reckless." 792 F. Supp. at 1537. Putting the district court's misconception of Missouri law aside, this case simply involves diametrically opposed credible evidence, and it is the jury's function to choose between plausible versions of the evidence. *Pence,* 961 F.2d at 781. *Pence* makes clear that when, as in this case, reasonable persons can differ in evaluating credible evidence and the district court has not diminished the credible evidence by finding witnesses unworthy of belief or otherwise properly rejecting some of the testimony, a new trial on the ground of weight of the evidence should not be granted. *Id.* The district court could not properly grant a new trial in this case. We thus need not remand, but simply reverse the district court's conditional grant of a new trial. *See id.*

Brown also contends the district court committed error in considering the jury's responses to special interrogatories that the district court submitted after the jury returned unambiguous verdicts. *See* 792 F. Supp. at 1540. We agree. Special interrogatories are inappropriate after

the jury has returned an unambiguous verdict because "there is no reason to ask the same question a second time in a different form" or to question the jury's reasoning. *Neufeld v. Searle Labs.*, 884 F.2d 335, 338 n.1 (8th Cir. 1989). Postverdict interrogatories may imply the jury's verdict is unjustified and cause the jury to answer the interrogatories in a manner inconsistent with the verdict. Thus, the district court should not have considered the jury's answers to postverdict interrogatories in deciding whether to grant a new trial. At any rate, the district court recognized the postverdict interrogatory answers alone would not warrant a new trial.

VII.

Accordingly, we affirm the district court's grant of JAML on Jacobs's claim and reverse the district court's grant of JAML or a new trial on Brown's fraudulent misrepresentation counterclaim. We remand to the district court with instructions to enter judgment in favor of Brown in accordance with the jury's verdict on Brown's fraudulent misrepresentation counterclaim.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

November 10th, 1994

Re: Jacobs Manufacturing Company
vs. Sam Brown Company
Case No. 92-1834 WMKC

TO WHOM IT MAY CONCERN:

This is to certify that the attached Judgment dated March 28, 1994, is a Clerk's judgment that did not become the Mandate of this Court until July 28, 1994, the date that it was issued and sent by letter to the Clerk of the United States District Court for the Western Disrict of Missouri.

Consistent with the customary practice of this Court, copies of this Judgment and the Mandate later issued pursuant to it were not sent to the parties or their counsel.

/s/ Michael E. Gans
MICHAEL E. GANS, Clerk
United States Court of Appeals
for the Eighth Circuit

[Filed Aug. 1, 1994, R. F. Connor, Clk., U.S. District Court, West. District of Missouri, 84-0887-CV-W-9]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834WMKC

THE JACOBS MANUFACTURING COMPANY,
Appellee,

v.

SAM BROWN CO.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded with directions in accordance with the opinion of this Court.

March 28, 1994

A true copy.

ATTEST: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834WMKC

THE JACOBS MANUFACTURING COMPANY,
Appellee,

v.

SAM BROWN CO.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant Sam Brown Company's motion for amendment of mandate is denied.

August 18, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk,
U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834WMKC

THE JACOBS MANUFACTURING COMPANY, COMPANY, *et al.*,

Appellees,

v.

SAM BROWN CO.,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's Motion For Reconsideration of August 18, 1994 order has been considered by the Court and is denied.

September 8, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk,
U.S. Court of Appeals,
Eighth Circuit

[Filed Sep. 11, 1990]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number: 84-0887-CV-W-9

THE JACOBS MANUFACTURING COMPANY,

v.

SAM BROWN COMPANY

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

On the claim of Sam Brown Company for fraudulent misrepresentation against Jacobs Manufacturing Company, we, the jury, find in favor of Sam Brown Company.

On the claim of Sam Brown Company for negligent misrepresentation against Jacobs Manufacturing Company, we, the jury, find in favor of Sam Brown Company.

We, the jury, assess the damages of Sam Brown Company under Instruction 12-13 at $2,491,792.35.

On the claim of Sam Brown Company for punitive damages, we, the jury, under Instruction 15, assess punitive damages in favor of Sam Brown Company

against Jacobs Manufacturing Company at $2.7 million.

Date September 11, 1990

R. F. CONNOR
Clerk

/s/ Tina Duer
(By) Deputy Clerk

[Entered on Sep. 12, 1990]

[Filed Aug. 25, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-0887-CV-W-9

THE JACOBS MANUFACTURING COMPANY,
Plaintiff,

v.

SAM BROWN COMPANY,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION RELATING TO ENTRY OF JUDGMENT AND ENTERING JUDGMENT

On August 1, 1994, the Eighth Circuit Court of Appeals filed its mandate in this case. The mandate affirmed in part, reversed in part and remanded the case. On August 4, 1994, the Eighth Circuit amended the mandate to include that Sam Brown Company recover $1,334.10 from The Jacobs Manufacturing Company as costs attributed to responding to the petition for rehearing. Judgment must now be entered in accordance with the opinion of the Eighth Circuit.

The Court of Appeals affirmed the grant of judgment as a matter of law in favor of The Jacobs Manufacturing Company in the amount of $727,732.82 and reversed both the grant of judgment as a matter of law and the alternative grant of a new trial in favor of The Jacobs Manufacturing Company on the counterclaim of Sam Brown Company. The amount of the jury verdict in favor of Sam Brown Company to be reinstated is $5,191,732.30.

Plaintiff filed a Motion Relating to Entry of Judgment on Remand. Plaintiff argues that according to Missouri law, "judgments concerning claims and counterclaims are generally offset and there is only one final judgment for the balance owed the party with the larger judgment." Therefore, plaintiff asserts I should enter a single judgment of $4,464,059.48, which is the result of subtracting the amount of the judgment against Sam Brown Company from the amount of the judgment against The Jacobs Manufacturing Company.

I must not deviate from the mandate issued by the Eighth Circuit Court of Appeals. *See Briggs v. Pennsylvania Railroad Company*, 334 U.S. 304, 306 (1948). The mandate remands the case "with directions in accordance with the opinion of this Court." The Eighth Circuit Court of Appeals' opinion states that "[w]e remand to the district court with instructions to enter judgment in favor of Brown in accordance with the jury's verdict on Brown's fraudulent misrepresentation counterclaim." *The Jacobs Manufacturing Company v. Sam Brown Company*, 19 F.3d 1259, 1267 (8th Cir. 1994). This language does not permit me to enter a judgment for less than the jury's verdict. Furthermore, judgment in favor of plaintiff on its claim against defendant has already been entered. To enter a single judgment now as plaintiff requests would in effect be reentering judgment on plaintiff's claim even though that judgment was affirmed by the Court of Appeals. Therefore, plaintiff's motion will be denied.

Based on the August 18, 1994, order of the Eighth Circuit Court of Appeals denying defendant's Motion to Amend the Mandate, interest on the judgment in favor of defendant will commence on the date of this judgment.

Accordingly, it is ORDERED that:

1) plaintiff's Motion Relating to Entry of Judgment is denied;

2) the jury's verdict of $5,191,792.35 in favor of Sam Brown Company is reinstated;

3) judgment is entered in favor of defendant and against plaintiff in the amount of $5,191,792.35 plus interest from this date of 5.49% per annum; and

4) plaintiff shall pay to defendant the costs awarded by the Court of Appeals in the amount of $1,334.01.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Judge

Kansas City, Missouri
August 25, 1994

[Filed Aug. 25, 1994]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-0887-CV-W-9

JUDGMENT IN A CIVIL CASE

THE JACOBS MANUFACTURING CO.,
Plaintiff(s),

v.

SAM BROWN COMPANY,
Defendant(s).

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

ORDERED that

(1) plaintiff's Motion relating to entry of judgment is DENIED;

(2) the jury's verdict of $5,191,792.35 in favor of Sam Brown Company is reinstated;

(3) judgment is entered in favor of defendant and against plaintiff in the amount of $5,191,792.35 plus interest from this date at 5.49% per annum; and

(4) plaintiff shall pay to defendant the costs awarded by the Court of Appeals in the amount of $1,334.01.

Date August 25, 1994

[Entered on Aug. 25, 1994]

R. F. CONNOR
Clerk

/s/ Yvonne Johnson
(by) Deputy Clerk

No. 94-989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAM BROWN COMPANY,
Petitioner,

v.

JACOBS MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly exercised its discretion under Fed.R.App.P. 37 and declined to amend its mandate to provide instructions with respect to the allowance of interest, thereby rejecting Petitioner's claim to an additional $2 million in interest in this case in which Petitioner had already recovered $5.2 million from Respondent, including $2.7 million in punitive damages.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-989

SAM BROWN COMPANY,
Petitioner,

v.

JACOBS MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. 1a-15a) is reported at 19 F.3d 1259. The opinion of the district court (App., *infra*, p. 1a-38a) is reported at 792 F. Supp. 1520.

JURISDICTION

The court of appeals issued its mandate on July 28, 1994 (Pet. App., p. 16a). Pursuant to Fed.R.App.P. 37, Petitioner filed a timely motion for the court of appeals to exercise its discretion to amend its mandate to provide instructions with respect to the allowance of interest (App., *infra*, pp. 39a-44a). The order of the court of appeals denying petitioner's motion to amend the mandate was entered on August 18, 1994 (Pet. App., p. 18a). By

order dated September 8, 1994, the court of appeals denied petitioner's motion for reconsideration of its order of August 18, 1994 (Pet. App., p. 19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

28 U.S.C. 1961(a). Interest

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, a a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

Fed.R.App.P. 37. Interest on Judgments

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instuctions with respect to the allowance of interest.

STATEMENT

Petitioner seeks review of a discretionary act of the court of appeals declining to amend its mandate to provide instructions with respect to the allowance of interest. In so ruling, the court of appeals limited the allowance

of interest to Petitioner to the period commencing with its reinstatement of the jury verdict set aside by the district court. It thereby rejected Petitioner's claim to an additional $2 million in interest in a case in which Petitioner had already recovered $5.2 million from Respondent, including $2.7 million in punitive damages. The discretion exercised by the court of appeals in this case was contemplated by this Court in promulgating Fed.R.App.P. 37. Hence, the varied responses by the circuit courts of appeals to the allowance of interest where the court of appeals modifies or reverses the judgment of the district court are all within the bounds of the exercise of permissible discretion. There is accordingly no conflict of decisions requiring resolution by this Court.

The pertinent facts can be summarized as follows: In 1976, Respondent Jacobs Manufacturing Company (sometimes referred to as "Jacobs") approached Petitioner Sam Brown Company (sometimes referred to as "SBC") to serve as one of its distributors to promote and sell the Jake Brake, a truck engine retarder that supplements the function of standard wheel brakes. (Pet. App., p. 2a). Commencing in April 1976, SBC and Jacobs entered into the first of a series of one-year distributorship agreements over the next eight years. Each of these agreements expressly provided that: (1) Jacobs could sell its brakes directly to original equipment manufacturers; (2) Jacobs could terminate the distributorship without cause; and (3) there could be no oral modifications of the distributorship agreement. (App., p. 7a).[1] Jacobs' relationship with SBC progressed profitably for both parties until the early 1980s,

[1] SBC did not append the district court's opinion to its Petition asserting that the opinion is "irrelevant to the questions presented" (Pet., 2). However, we have reprinted it for the convenience of the Court because we believe that the facts set forth in the district court's opinion illuminate the background against which the court of appeals declined to exercise its discretion to provide instructions with respect to interest.

when recession engulfed the trucking industry and the patent on the Jake Brake expired. These two economic developments forced Jacobs to commence selling its products directly to manufacturers at the same price charged to distributors. The distributor agreements expressly reserved Jacobs' right to make direct sales and Jacobs so notified the distributors. (Tr. 984-85, 1066).[2] SBC was the sole distributor who objected to Jacobs' new practice and refused to accept Jacobs' new policies when announced. Thereafter, SBC placed a large order for Jake Brakes but refused to pay for this order, which it received and resold for more than $400,000 (Tr. 1204, 1214).

A. Proceedings in the District Court

Jacobs thereupon commenced this diversity action in the United States District Court for the Western District of Missouri to recover the amount SBC owed to Jacobs on its final order of Jake Brakes. In response, SBC not only denied liability but counterclaimed against Jacobs for fraudulent and negligent misrepresentation (App., p. 1a-2a). Notwithstanding the express provisions of the distributorship agreements, SBC contended that Jacobs had given it oral assurances that its distributorship would remain forever secure. The district court (Bartlett, J.) directed a verdict for Jacobs on the $400,000 debt, but the jury returned verdicts against Jacobs on SBC's counterclaim for nearly $2.5 million in compensatory damages and $2.7 million in punitive damages. That judgment was entered on September 12, 1990. (Pet. App., p. 20a).

On January 8, 1992, the district court set aside the jury's verdict and granted Jacobs' motions for JNOV (now "JAML") and new trial. (App., p. 2a). The court found no evidence that SBC could have reasonably relied on any of the alleged oral assurances. On the contrary, the court found "unchallenged evidence" that SBC signed another

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[2] Record citations are to trial testimony ("Tr.") and to the specific testimony of SBC's CEO Bernard Brown ("Brown Tr.").

distribution agreement even after it learned Jacobs was considering changes in its method of distribution (App., p. 8a). The court also vacated the $2.7 million punitive damage award because it was "the result of passion and not the result of the exercise of reasoned discretion." (App., p. 30a). Finding that the $2.7 million punitive award bore "no rational relationship" to any harm which Jacobs caused or was likely to cause, the court concluded that "the amount of punitive damages awarded by the jury was so unrealistic as to demonstrate irrational rather than rational behavior" (App., p. 30a). As the district court concluded (App., p. 38a):

> [T]he jury reached a seriously erroneous result in this case under the evidence presented to it. Emotion rather than reason appears to have directed this jury. In fact, defendant's case on its counterclaim appeared to be based to a large extent on appeals to emotion as a means of avoiding the terms of written agreements.

B. Proceedings in the Court of Appeals

The court of appeals reversed the district court's grant of both JAML and new trial and reinstated the jury's verdict[3] (Pet. App., pp. 1a-15a). Despite the district court's first-hand evaluation of the evidence, the demeanor of the witnesses and the conduct of the trial, the court of appeals discarded the district court's evidentiary findings that the jury responded emotionally rather than rationally (Pet. App., pp. 7a-10a). The court of appeals also concluded, without significant elaboration, that the $2.7 million punitive damage award was reasonably related to SBC's injury and did not "shock[] our constitutional sensibilities" (Pet. App., pp. 11a-12a). Finally, the court of appeals reversed the district court's grant of new

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[3] The court of appeals affirmed the district court's grant of JAML on Jacobs' complaint for the $400,000 debt (Pet. App. p. 15a).

trial, even though it did not find that the district court abused its discretion in awarding a new trial. (Pet. App. 12a-14a). Instead, the court of appeals undertook a *de novo* review of the new trial grant which afforded no deference to the district court's first-hand observation of the trial. (Pet. App. 12a-14a).

The court of appeals issued its opinion on March 28, 1994 (Pet. App., p. 17a). The opinion mandated entry of judgment on the jury's original verdict, but it did not contain instructions with regard to the allowance of interest (Pet. App., p. 15a).

C. Post-Appeal Proceedings

Jacobs timely petitioned the court of appeals for a rehearing and also suggested rehearing *en banc*. On June 27, 1994, the court denied both the petition and the suggestion, with two judges dissenting. On July 28, 1994, the clerk of the court of appeals issued the mandate to the clerk of the district court, whereupon SBC moved the court of appeals to recall its mandate to provide for post-judgment interest from the original entry of judgment on the jury verdict (App., p. 39a). In its motion, SBC urged the court of appeals to "exercise its discretion" under Fed.R.App.P. 37 and provide instructions to award post-judgment interest from the date of the original judgment in 1990 (App., p. 39a). SBC did not argue, or cite any authority for the proposition, that the court of appeals was required as a matter of law to award interest from that date (App., p. 40a-43a).

On August 18, 1994, the court of appeals denied SBC's motion (Pet. App. 18a), and on August 25, 1994 the district court entered judgment on the court of appeals' mandate reinstating the jury's $5.2 million verdict. (Pet. App. 25a) Under the rule of *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), which prescribes that district courts may not in any way deviate from appellate court mandates, the district court could only award

interest from the entry of judgment by the court of appeals (Pet. App. 22a-24a). On September 8, 1994, the court of appeals denied SBC's motion for reconsideration of its order declining to recall the mandate (Pet. App. 19a).[4]

ARGUMENT

I. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE ALLOWANCE OF INTEREST ON A JUDGMENT THAT WARRANTS RESOLUTION BY THIS COURT

The court of appeals properly exercised its discretion in this case and declined to amend its mandate to provide instructions for the allowance of interest. As a result, it rejected Petitioner's claim for an additional $2 million of interest in a case in which Petitioner had already recovered $5.2 million from Respondent, including $2.7 million in punitive damages. This exercise of discretion by the court below, and similar exercises of discretion by the other appellate courts, does not constitute a conflict of decisions that requires resolution by this Court. Indeed, the Court concluded as much in denying review in *Chattem, Inc. v. Bailey*, 838 F.2d 149 (6th Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988), where the petitioner likewise claimed the existence of a conflict. Since the Court considered the petition in *Chattem, Inc.*, the courts of appeals have properly continued to exercise their varying discretion with respect to the allowance of interest.

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[4] On September 26, 1994, Jacobs petitioned this Court for a writ of certiorari (No. 94-653) seeking review of the court of appeals' reinstatement of the punitive damages award. In its petition, Jacobs argued that the court of appeals had departed from this Court's settled rule that the district courts have broad discretion to order new trials, and thereby violated the standards for procedural due process required by this Court's decisions assessing the constitutionality of punitive damage awards. At that time, SBC did not file a cross-petition on the interest issue or raise that issue in its Brief in Opposition to Jacobs' petition. On November 7, 1994, this Court denied Jacobs' petition.

Accordingly, there have been no developments or new evidence in the last seven years that rise to the level of a conflict warranting review by this Court.

Congress has long provided that "Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. 1961(a). Absent an appeal, it is clear that interest runs from the date of the judgment of the district court. Moreover, if the court of appeals affirms the judgment of the district court, the rule is likewise clear that interest shall be payable from the date the judgment was entered in the district court.

Almost 50 years ago in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), this Court considered the question of post-judgment interest in a case in which the court of appeals had reversed the judgment of the district court and directed the entry of a money judgment. In *Briggs*, the jury returned a verdict for the plaintiff in the amount of $42,500. Subsequently, the district court dismissed the plaintiff's complaint for lack of jurisdiction. 334 U.S. at 305. On appeal, the court of appeals reversed the district court's jurisdictional ruling and ordered entry of judgment on the verdict. However, the court of appeals made no provision in its mandate for interest on the judgment. *Id.*

Thereafter, the district court entered the judgment and ordered that interest be paid from the date of the original verdict. The defendant sought review of the district court's award of interest. On appeal, the court of appeals ruled that the interest awarded by the district court was improper because it deviated from the mandate of the court of appeals. In so holding, the court of appeals applied the settled rule that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. This Court affirmed, likewise stating that it was "clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the

Circuit Court of Appeals." *Id.* at 306. In light of this ruling, this Court further observed that the plaintiff was not entitled to interest because she had not moved to amend the mandate but simply sought to have it disregarded. The Court therefore found it unnecessary to address the question as to the computation of interest in a case where the court of appeals reverses the judgment of the district court and directs the entry of a money judgment.

In the wake of *Briggs*, it was understood that when the court of appeals' mandate provides no instructions with respect to the allowance of interest in a case in which it reverses or modifies the judgment of the district court, interest can only run from the entry of judgment by the district court on remand. In such a case, the district court may not deviate from or otherwise amend the mandate of the court of appeals directing entry of a money judgment.

Twenty years later, pursuant to the Rules Enabling Act, 28 U.S.C. 2072, this Court promulgated Fed.R.App. P. 37, in order to call the *Briggs* rule to the attention of the bench and bar. Thus, the second sentence of Rule 37 provides: "If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with regard to the allowance of interest." As the Advisory Committee Notes to Rule 37 state, "the second sentence of [Rule 37] is a reminder to the court, the clerk and counsel of the *Briggs* rule." In promulgating Rule 37, and thereby permitting the courts of appeals to give "instructions" regarding the allowance of interest, this Court accorded the appellate courts broad discretion to determine the proper date from which interest should be computed based upon the equities of each case. As the Second Circuit observed in *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 473 (2d Cir. 1988), Rule 37 "gives appellate courts discretion to decide the [compu-

tation of interest] issue on a case-by-case basis." While the courts of appeals would possess such discretion even in the absence of a rule, Rule 37 reminds the courts of appeals of the *Briggs* decision that when appellate mandates contain no instructions with respect to the allowance of interest, interest will run only from the entry of judgment by the district court on remand.

As one would expect under any rule conferring discretion, the courts of appeals have exercised their discretion under Rule 37 differently. Some circuits have decided that, where they reverse or modify a district court's decision and direct entry or reinstatement of an earlier judgment, they will ordinarily award interest from the initial entry of judgment in the district court. *See e.g.*, *DeLong Equipment Co. v. Washington Mills Electro Mineral Corp.*, 997 F.2d 1340 (11th Cir. 1993), *cert. denied*, 510 U.S. ——, 114 S.Ct. 604 (1993); *Cordero v. De Jesus-Mendez*, 922 F.2d 11 (1st Cir. 1990).[5] However, none of these circuits has adopted an absolute rule that interest accrues from the original judgment.[6]

[5] SBC cites (Pet. 15) *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198 (7th Cir. 1989) for the proposition that the Seventh Circuit has likewise adopted the rule that interest accrues from the date of the original judgment. The Seventh Circuit, however, has adopted no such rule. In *Brown & Williamson Tobacco Corp. v. Jacobson*, 9 Fed.R.Serv. 630 (7th Cir. 1987), the Seventh Circuit explicitly approved the "case-by-case approach" an "inherent outgrowth of Rule 37, which grants the appellate court discretion with respect to allowing interest" (*id.* at 632). There, the Seventh Circuit held that on the facts of the case, post-judgment interest should run from the date of its mandate.

[6] *But cf. Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (3rd Cir. 1993). There, the plaintiffs sued a group of coal and railroad companies for fraud in the purchase of land and recovered large compensatory and punitive damage awards. After considerable post-trial litigation in which the jury awards were vacated, reinstated and appealed several times, the Third Circuit held that under the particular factual circumstances of the case, post-judgment interest should run from the original judgment on the verdict. The court suggested in *dicta* that where a court of appeals

By contrast, other circuits determine the date from which interest runs based on the particular equities of each case. *See e.g., Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986); *Smith, supra,* 856 F.2d 467 (2d Cir. 1988). Contrary to SBC's assertion (Pet. 12-18), these different responses do not represent a "conflict" in the circuits. Rather, they simply reflect varied results fashioned after due regard for the underlying facts of the case, a process which is exactly what this Court contemplated would occur in promulgating Rule 37.

Indeed, Petitioner acknowledged the discretion of the court of appeals with regard to interest in its motion below to amend the mandate. In that motion, Petitioner urged the court of appeals to "exercise its discretion" to allow post-judgment interest from the original entry of judgment (App., p. 39a), and referred several times to the court's "discretion" regarding such interest. (App., p. 41a) Now, however, Petitioner has shifted ground and asserts that the question does not reside in the discretion of the courts of appeals, but that there is a conflict in the circuits. As Petitioner now sees the matter (Pet. 12-13), those circuits which have awarded interest from the original judgment have held that they are required to do so "as a matter of law." But none of the cases which Petitioner cites so holds that post-judgment interest must run from a particular date as a matter of law. On the contrary, those decisions correctly acknowledge either explicitly or implicitly that Rule 37 does not lay down a rigid rule but leaves the interest determination to the sound discretion of the courts of appeals. *DeLong,* 997 F.2d at 1342; *Cordero,* 922 F.2d at 16-18. And that is precisely what the court of appeals did in this case in declining to amend its mandate.

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reverses a district court's grant of judgment n.o.v. and reinstates the original judgment in its entirety, post-judgment interest runs from the first judgment (*id.* at 98).

II. THE FACTS OF THIS CASE ILLUSTRATE THE WISDOM OF THE RULE ACCORDING DISCRETION TO THE COURTS OF APPEALS TO DETERMINE THE DATE FROM WHICH POST-JUDGMENT INTEREST SHOULD BE COMPUTED

In the nearly 50 years since *Briggs,* the courts of appeals have, on numerous occasions, exercised their discretion to determine the proper starting date for the computation of interest based on the equities of each case. The circuits have exercised their discretion responsibly; otherwise, this Court would not have reaffirmed that discretion in Rule 37 and denied certiorari seven years ago in *Chattem, Inc. v. Bailey, supra,* where the petitioner made a similar allegation of a conflict. Moreover, the facts of this case illustrate the wisdom of the rule according discretion to the courts of appeals with respect to interest.

Following the trial below, the district court confirmed the propriety of Jacobs' complaint against SBC by directing a verdict in favor of Jacobs. The jury then surprised the district court by awarding SBC nearly $5.2 million on SBC's counterclaim, including $2.7 million in punitive damages. After careful consideration, the district court found those damages to be entirely unwarranted; accordingly, it set aside the jury verdict and awarded Jacobs JAML or, in the alternative, a new trial. The court of appeals disagreed, finding enough evidence to support the jury's verdict. But the court of appeals was necessarily aware of the district court's belief that the jury's verdict was "seriously erroneous," and that the jury was directed by "emotion rather than reason." Given the equities of the situation, it was well within the discretion of the court of appeals to decline to recall its mandate and thereby refuse to award an additional $2 million in interest to SBC. While the court did not elaborate its reasoning, its denial of SBC's motion to exercise its discretion and amend its mandate shows that it was unwilling to impose an additional $2 million liability upon Jacobs in view

of the judgment against Jacobs of $5.2 million, including a $2.7 million windfall to SBC in punitive damages.

The Fifth Circuit reached the same conclusion in a case involving very similar equities. In *Affiliated Capital, supra,* 793 F.2d 706, an unsuccessful cable television franchise applicant sued the City of Houston and the successful applicants for unlawful conspiracy under the antitrust laws. As in the instant case, the plaintiff won a jury verdict, the district court granted JNOV, and the court of appeals reversed the JNOV. 793 F.2d at 708. The plaintiff then moved for post-judgment interest to run from the date of the original judgment. *Id.* The court of appeals denied this motion, and denied the very request which SBC makes to this Court: for a "hard and fast" rule requiring that post-judgment interest accrue from the earlier judgment. *Id.* As the Fifth Circuit stated: "Such a 'rule' ignores the fact that the 'equities' vary from case to case." *Id.* at 710. The court observed that the plaintiff's victory was "far from clear-cut" because, *inter alia,* the opinion reinstating the verdict "rested merely on the conclusion that the evidence was *sufficient*" to support the verdict. *Id.* at 711-712 (emphasis in original). More importantly, the court noted that the trebled antitrust damages would more than compensate plaintiff's loss, and hence that the failure to award interest from the earlier date would not undermine the plaintiff's appropriate compensation. *Id.* at 712.

Here, too, the court of appeals' reinstatement of the jury's verdict rested solely on its finding that the evidence was adequate to support the verdict, despite the district court's contrary conclusion. Moreover, the punitive damage award of $2.7 million far exceeds the interest which SBC seeks from the date of the original judgment (approximately $2 million). Therefore, as in *Affiliated Capital,* the failure to recover interest from the earlier date will not diminish SBC's compensatory award. Given the similar equities in *Affiliated Capital,* the court of appeals below properly reached the same result: the $5.2 million

verdict was "punishment enough" for Jacobs. Jacobs should not be forced to pay another $2 million in interest, particularly where that interest would represent an absolute windfall above and beyond SBC's compensatory damages.

Indeed, the reasoning set forth in *Affiliated Capital* illustrates a significant problem with the "hard and fast" rule which SBC espouses. SBC argues that the failure to award interest from the original entry of judgment would afford a "windfall" to Jacobs, and a "penalty" to SBC, by virtue of the erosion in the value of the original money judgment. Pet. 14, quoting *DeLong*, *supra*, 997 F.2d at 1342. On the contrary, as the court below and the Fifth Circuit in *Affiliated Capital* recognized, there would be a windfall that would accrue to SBC if interest is awarded from the original judgment. By their very nature, punitive damages are a windfall to prevailing plaintiffs. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Lukhard v. Reed*, 481 U.S. 368, 389 (1987) ("Punitive damages, in the exceptional case in which they are awarded, are a windfall to the plaintiff rather than compensation." (Powell, J., dissenting)).

Thus, properly considered, the court of appeals' rejection of SBC's claim to additional interest does not work an erosion upon its compensatory award. Given the windfall nature of punitive damages, SBC seeks what is essentially interest on a windfall—which represents an additional windfall. Pursuant to Rule 37, a court of appeals may properly decide to exercise its discretion to award interest from the original judgment in a case involving no punitive damages to the plaintiff, in order to preserve the value of the plaintiff's compensatory damage award. However, where, as here, a plaintiff receives windfall punitive damages in addition to compensatory damages, under circumstances that the district court found questionable, the court of appeals may properly conclude that the equities of the case dictate that the plaintiff should not receive —and the defendant should not have to pay—the addi-

tional windfall of interest. The "hard and fast" rule urged by SBC would prevent the courts of appeals from distinguishing between these very different cases, and generally from undertaking the *Affiliated Capital* balance-of-equities analysis in assessing post-judgment interest that is contemplated by Rule 37.

Perhaps the most compelling evidence to support the wisdom of according discretion to the courts of appeals regarding post-judgment interest comes from an earlier decision of the court of appeals which decided the instant case. SBC asserts that in *Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985), the court of appeals adopted the "hard and fast" rule which SBC now advocates. In fact, *Buck* retained the balance-of-equities approach. In *Buck*, as here, the court of appeals reversed the district court's grant of JNOV and reinstated the verdict. In *Buck*, however, the court awarded post-judgment interest from the date of the original judgment. In so ruling, the court stated (768 F.2d at 287):

> *The equities of the situation dictate* that the successful plaintiff receive interest on the loss of the use of the money judgment from the date damages were ascertained—that is, the date upon which plaintiff's original judgment should have been entered had the district court not erroneously granted judgment n.o.v. 768 F.2d at 287 (emphasis added).

SBC contends (Pet. 17) that, in the instant case, the Eighth Circuit has abandoned *Buck* and "is now uncertain what its position should be . . . ." But the court in *Buck* gave no indication that the plaintiff in that case recovered punitive or other windfall damages, and expressly stated that the award of interest from the original judgment was based on "the equities of the situation." 768 F.2d at 287. That result is entirely consistent with the decision below, in which SBC recovered a substantial punitive damage award. In these circumstances, the equities of the situation dictate that Jacobs should not be compelled to pay

another $2 million in post-judgment interest. Thus, *Buck* amply confirms the injustice inherent in the rigid rule which SBC proposes, and the wisdom of the settled, discretionary approach which this Court adopted in promulgating Rule 37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1995

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APPENDIX A

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 84-0887-CV-W-9

THE JACOBS MANUFACTURING COMPANY,
Plaintiff,

v.

SAM BROWN COMPANY,

v.

CHICAGO PNEUMATIC TOOL COMPANY,
THOMAS LATIMER and DONALD B. SANDSTROM,
Defendants.

Jan. 8, 1992

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND GRANTING, IN THE ALTERNATIVE, PLAINTIFF'S MOTION FOR A NEW TRIAL ON DEFENDANT'S COUNTERCLAIM FOR FRAUD AND NEGLIGENT MISREPRESENTATION

BARTLETT, District Judge.

Background

Beginning on August 20, 1990, evidence was presented to the jury on plaintiff Jacobs Manufacturing Company's claim for an unpaid account and on defendant Sam Brown Company's counterclaim for fraud and negligent misrep-

resentation. After a directed verdict was entered on plaintiff's claim, the jury returned verdicts for actual and punitive damages in favor of Brown on its counterclaims. Thereafter, Jacobs requested that the jury's verdicts be set aside and that judgment be rendered in its favor in accordance with its Motions for Directed Verdict. In addition, Jacobs moved for judgment notwithstanding the verdict pursuant to Rule 50(b), Federal Rules of Civil Procedure, and for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure.

For the reasons stated in this opinion, Jacobs' Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict will be granted. In the alternative, Jacobs' Motion for New Trial will be granted.

I. MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

A. *Standard of Review*

The standard for a directed verdict is the same as the standard for judgment notwithstanding the verdict. *City of Omaha Employees Betterment Ass'n v. City of Omaha,* 883 F.2d 650, 651 (8th Cir. 1989).

Judgment may be entered in favor of the moving party if there is but one reasonable conclusion about the proper result. *Compton v. United States,* 377 F.2d 408, 411 (8th Cir.1967). Motions for directed verdict and for judgment notwithstanding the verdict challenge the sufficiency of the evidence to support the jury's verdict. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940). In deciding whether to grant a motion for directed verdict or for judgment notwithstanding the verdict, I must consider the evidence in the light most favorable to the non-moving party, assume that all conflicts in the evidence were resolved by the jury in favor of the non-moving party, assume, as proved, all facts which the non-moving party's evidence tends to prove and

give the non-moving party the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir.1977). The court may not consider the credibility of the witnesses or the weight of the evidence. *Mv-Knelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for directed verdict or for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080, 103 S.Ct. 1767, 76 L.Ed.2d 342 (1983).

B. *Fraudulent Misrepresentation Claim*

Brown contends that Jacobs made three misrepresentations: 1) that Jacobs was not *considering any plans* to change its existing method of distributing the Jake Brake; 2) that Jacobs *had no plans* to change its existing method of distributing the Jake Brake; and 3) that if Brown continued to be a Jake Brake distributor during bad economic times, its distributorship would continue during good economic times.

Jacobs argues that these representations were never made. In the alternative, Jacobs argues that if they were made, they are not actionable because they were not false when made and representations of future intent must be false when made in order to be actionable.[1]

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[1] In its Suggestions in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict, Brown, relying on *California & Hawaiian Sugar Co.* v. *Kansas City Terminal Warehouse Co., Inc.*, 602 F.Supp. 183 (W.D.Mo.1985); *aff'd*, 788 F.2d 1331 (8th Cir. 1986), attempts to support the jury's verdict by arguing that this case involves plaintiff's fraudulent failure to disclose that it was

1. Elements of Claim for Fraudulent Misrepresentation

In order to prevail on its claim for fraudulent misrepresentation, Brown was required to establish: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of the falsity or ignorance of truth; 5) plaintiffs' intent that the representation be acted upon; 6) defendant's ignorance of the falsity of the representation; 7) defendant's reliance on the truth of the representation; 8) defendant's right to rely on the representation; and 9) defendant's consequent and proximate injury. *Clark v. Olson,* 726 S.W.2d 718, 719 (Mo. banc 1987). Failure to establish any single element is fatal to the entire claim. *Powers v. Shore,* 248 S.W.2d 1, 5 (Mo. banc 1952). Fraud may never be presumed; therefore, fraud cannot be proved by facts and circumstances which are equally consistent with honesty and good faith. *Macon-Atlanta State Bank v. Gall,* 666 S.W.2d 934, 941 (Mo.App.1984).

To establish fraud where a statement of future intent is involved, it must be shown that the speaker at the time of the utterance actually intended to perform inconsistently with his words. *Dillard v. Earnhart,* 457 S.W.2d 666, 670 (Mo. banc 1970); *Craft v. Metromedia, Inc.,* 766 F.2d 1205, 1219 (8th Cir.1985), *cert. denied,* 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986). Absent a present intent to perform inconsistently with the representation, there is no misrepresentation of fact or of state of mind but only breach of a promise or failure to perform. *Craft,* 766 F.2d at 1219. Mere failure to perform is sufficient to establish fraud. *Brennaman v. Andes & Robert Bros. Const. Co.,* 506 S.W.2d 462, 465 (Mo.App. 1973).

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considering plans to change its method of distribution. Fraudulent concealment, however, was not a theory of liability asserted by Brown and was not submitted to the jury.

2. None of the Representations Should Have Been Submitted to the Jury

The first two representations relied upon by Brown as the basis for its fraudulent misrepresentation claim are: 1) Jacobs represented that it was not considering any plans to change its existing method of distributing the Jake Brake, and 2) after July 1981, Jacobs represented that it had no plans to change its existing method of distributing the Jake Brake. Both of these representations are of present fact, not future intent.

With regard to the first representation, there was evidence, including reasonable inferences from the evidence, from which the jury could have concluded reasonably that 1) Jacobs represented it was not considering any plans to change its existing method of distributing the Jake Brake; and 2) Jacobs *was considering* plans to change its existing method of distributing the Jake Brake at the time the representations were made.

With regard to the second representation, there was no evidence from which the jury could reasonably conclude that Jacobs actually had plans to change its method of distributing the Jake Brake when it represented that it had no plans to change its method of distributing the Jake Brake. The evidence that Jacobs was *considering* changing its method of distribution would not permit a reasonable jury to conclude that Jacobs had, therefore, *decided* to change its method of distribution. Brown failed to present evidence from which a reasonable jury could conclude that the second representation was false. Therefore, the second representation should not have been submitted to the jury.

The third representation relied upon by Brown is that after July 1981, Jacobs represented that if Brown continued to be a Jake Brake distributor during bad economic times, its distributorship would continue during good economic times.

This is a representation of future intent. There was no evidence presented by Brown from which a reasonable

jury could conclude that when this representation were made, Jacobs intended to terminate Brown's distributorship of the Jake Brake when good economic times arrived.

Brown argues that there were several studies done by Jacobs over the years that showed a present intent to terminate the distributorship when the economy improved. Although Brown is correct that these studies recommend the termination of the distributors, there was no evidence from which a reasonable jury could conclude that these recommendations were ever adopted by Jacobs. In fact, Jacobs never eliminated distributors.

Accordingly, the second and third representations should have been submitted to the jury in Instruction 12, the verdict-directing instruction submitting plaintiff's fraudulent misrepresentation claim. Because the representations were submitted in the disjunctive and the jury believed that Jacobs made the first representation, *see* the jury's response to the special interrogatory designated Instruction 19, the analysis must continue.

Having concluded that there was evidence from which a reasonable jury could conclude that the first representation was made and that it was false, there must have been evidence from which a reasonable jury could have concluded that Brown actually relied on this misrepresentation. *Country Shindig Opry, Inc. v. Cessna Aircraft Co.*, 780 F.2d 1408, 1411-12 (8th Cir.1986). Also, there must be evidence from which a reasonable jury could conclude that Brown had a right to rely on this representation. *Hanson v. Acceptance Finance Co.*, 270 S.W.2d 143, 149 (Mo.App. 1954). (If at some later time it were concluded that there was evidence from which a reasonable jury could have found that either the second or third representations were made and were false, the

following discussion of reliance would be applicable to those representations).

Brown's president had a degree in economics and was an experienced businessman. He had participated in many contract negotiations, distributed products for at least 100 different manufacturers over the years and had the services of an experienced attorney readily available. For eight successive years, Brown's president signed distributorship agreements providing that 1) the term of the agreement was one year and was terminable without cause on 30 days notice, 2) Jacobs reserved the right to sell directly to any original equipment manufacturer, 3) the written agreement was the sole agreement between the parties and 4) no amendment to that agreement was binding unless agreed to in writing.

Bernard Brown testified that the provisions of the agreement concerning its duration and Jacob's reservation of the right to sell directly to original equipment manufacturers were merely boilerplate. Brown's constant repetition of "boiler-plate" when combined with a disdainful tone of voice, communicated to the jury that the words in the agreement were meaningless. In fact, these were provisions that Brown, as president of the defendant, agreed to and that Jacobs and defendant Brown intended to govern their relationship. If Brown treated them as cavalierly as he suggested to the jury that it should and if he relied on inferences drawn from various events that were in direct conflict to written provisions of the contract, he must bear the consequences of his ill-advised behavior.

No facts were presented that would, as a matter of law, justify Brown's reliance on oral statement or inferences from oral statements directly conflicting with the clear, written terms of the agreement with Jacobs. Brown never consulted with his attorney about the legal effect of the written agreements. According to his testimony, he

invested hundreds of thousands of dollars and incurred large losses based on his assumption that oral statements by various people at Jacobs carried more weight than the written agreements. If Brown remained a Jacobs distributor because of oral representations that Brown had a future as a Jacobs distributor, under the same conditions as in the past, while at the same time signing written distributorship agreements that conflicted with these oral statements, Brown must bear the consequences. The law will not protect Brown from his own carelessness.

Furthermore, there was unchallenged evidence that Brown knew Jacobs was considering changes in its method of distribution but that Brown went ahead and signed another agreement. On July 28, 1982, Bernard Brown, president of Sam Brown Company, wrote Jacobs demanding "a statement from Jacobs indicating what their position would be and if, in fact, the distributor will continue to be a part of the marketing policy of Jacobs or that OEMs and large fleets will be shipped direct from Hartford as is the apparent indication at this point." Defendant's Exhibit 8267. Jacobs responded, "Future market conditions and demands may require a change in the manner in which Jacobs satisfies requirements of superfleets and vehicle and engine OEMs." Plaintiffs Exhibit 12. Brown responded by saying in part, "It seems to me that Jacobs' management has apparently set in motion a far-reaching plan to change your method of distribution which will affect your independent distributors such as ourselves. . . . Since you have unilaterally reevaluated your policies, we will have to do the same." Defendant's Exhibit 8269. After this exchange of correspondence, Brown entered into a distribution contract with Jacobs on essentially the same terms as in previous years. Plaintiff's Exhibit 211. There was no evidence that Jacobs made some misrepresentation in the four months between the correspondence quoted above and the signing of the next agreement that induced Brown to sign a new agreement.

Accordingly, a reasonable jury could not have determined that Brown was justified in relying on representations that Jacobs was not considering changing its method of distribution.

These conclusions are fatal to Brown's claim of fraudulent misrepresentation. The claim never should have been submitted to the jury. Therefore, Jacobs' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict will be granted on Jacob's fraudulent misrepresentation claim.

C. *Negligent Misrepresentation Claim*

The jury found that Jacobs negligently represented "from and after July 1981, that if Sam Brown Company continued to be a 'Jake Brake' distributor during bad economic times, its 'Jake Brake' distributorship would contuine during good economic times." *See* jury's response to special interrogatory designated Instruction 20.

1. Elements of Claim for Negligent Misrepresentation

The elements of a negligent misrepresentation claim are that: 1) the defendant supplied information in the course of its business or because of some other pecuniary interest; 2) because of a failure by defendant to exercise reasonable care or competence, the information was false; 3) the information was intentionally provided by defendants for the guidance of a limited group, including plaintiff, in a particular business transaction; and 4) in relying on the information, plaintiff suffered a pecuniary loss. *Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo. App.1989); *Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 766, 783-784 (Mo.App.1983). Liability for negligent misrepresentation has been limited to situations where 1) the defendant has knowledge of the specific injured party's reliance; or 2) the plaintiff is a member of a group that the defendant

seeks to influence; or 3) the defendant has special reason to know that some member of a limited group will rely on the information. *Chubb,* 656 S.W.2d at 784; *Mark Twain Plaza Bank v. Lowell H. Listrom & Co.,* 714 S.W.2d 859, 865 (Mo.App.1986).

2. The Third Representation Should Not Have Been Submitted to the Jury

Whereas fraudulent misrepresentation requires proof that the speaker *knew* the statement was untrue or was *reckless* as to whether the statement was true or false, negligent misrepresentation "merely requires proof that the [speaker] failed to exercise reasonable care or competence to obtain or communicate true information." *Huttegger v. Davis,* 599 S.W.2d 506, 516 (Mo. banc 1980) (Welliver, J., dissenting). A negligent misrepresentation claim is premised upon the theory that the speaker believed that the information supplied was correct, but was negligent in so believing. The typical action for negligent misrepresentation thus involves a representation of an *existing fact,* not a representation of *future intent.* While it is possible to be negligent in failing to ascertain the truth or falsity of an existing fact, it is impossible to be negligent in failing to ascertain the truth or falsity of one's own future intentions. One cannot negligently represent his or her own state of mind. *See Restatement (Second) of Torts* § 530 cmt. b (1977). Even if one states an intent to act in a certain manner and is merely *uncertain* if one intends to act in that manner, the statement is not negligent but deceitful because one *knows* about the uncertainty of one's future intent.

Consequently, no cause of action exists for negligent misrepresentation of the promisor's intention to perform an agreement. *City of Warrensburg, Mo. v. RCA Corp.,* 571 F.Supp. 743 (W.D.Mo.1983).

Here, the representation the jury believed was negligently made is a statement about Jacobs' intent to per-

form in a certain way in the future. Because no cause of action exists for negligent representation of future intent, it was error to submit this representation to the jury.

If this were not a representation of future intent, there would have to have been evidence from which a reasonable jury could conclude that Brown actually relied on the misrepresentation. *Chubb,* 656 S.W.2d at 783-784. For the reasons discussed in the analysis of Brown's fraudulent misrepresentation claim, a reasonable jury could not have concluded that Brown relied on the representation or, if it did, that Brown used ordinary care in so doing.

Accordingly, Jacobs' Motion for Directed Verdict and for Judgment Notwithstanding the Verdict on Brown's negligent misrepresentation claim will be granted.

D. *Jury Award for Lost Future Profits Should be Vacated*

The jury awarded Brown $2,220,627 in lost future profits for the five-year period beginning in 1984. Jacobs asserts four reasons to vacate this award: 1) loss of future profits is not a proper measure of damages for fraudulent or negligent representation, 2) the evidence of lost future profits was speculative, 3) any loss of future profits was not the proximate result of any of the claimed fraudulent or negligent representations, and 4) Brown waived any claim for lost future profits.

1. Loss of Future Profits is a Proper Measure of Damages

Jacobs contends that the traditional "benefit of the bargain" measure of damages is not applicable where the claim is fraudulent inducement to continue a distributorship agreement. According to Jacobs, damages are correctly measured by the net *losses* the distributor can prove

were sustained as a result of an during the continuation of the distributorship, not by lost future profits.

Brown agrees that the traditional "benefit of the bargain" measure does not apply to this case but disputes Jacobs' contention that lost future profits are unrecoverable.

The general rule is that prospective profits are recoverable when an established business is interrupted by tortious conduct if it is proved that 1) it is reasonably certain that profits would have been realized except for the tort and 2) the lost profits can be ascertained and measured, from the evidence introduced, with reasonable certainty. *Riddle v. Dean Machinery Co.*, 564 S.W.2d 238, 257 (Mo.App.1978), citing 22 Am.Jur.2d, Damages § 177 (presently § 639 (1988)).

Jacobs' reliance on *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220-1221 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983), as authority to the contrary is mistaken. There, the defendant was sued for fraudulently inducing the plaintiff to continue as a software dealer for defendant. Jacobs relies on the following language:

> As to fraud in a transaction, the typical "bargain theory" measure is the difference between the actual value and the represented value of the subject of the transaction. *See Smith v. Tracy, supra*, 372 S.W.2d [925] at 938. Such a measure simply makes no sense in this case, given the nature of the fraud. [Defendant] did not make representations as to specific values or as to particular facts directly relating to such values. It fraudulently induced [plaintiff] to continue as a dealer and the harm from such continuation is best measured by the net losses incurred as result [sic] of it.

Central Microfilm, 688 F.2d at 1220-1221.

Although it is true that the nature of the fraud here is the same as in *Central Microfilm,* I do not believe that the last-quoted sentence was intended to preclude recovery of lost future profits in all cases. In *Central Microfilm,* the plaintiff "introduced no evidence of future profits and sought no recovery on such a basis." *Id.* at 1220. The plaintiff actually pursued a 'reliance or out-of-pocket loss theory." *Id.* Thus, the court's statement that "the harm from such continuation is best measured by the net losses incurred as result of it" must be read simply as an acknowledgment that, of the two theories presented to it, the out-of-pocket loss theory was the more appropriate because 1) it was the theory actually pursued, and 2) the traditional method of computing the "benefit of the bargain" did not fit the facts. The court did not discuss whether an alternative method of computing the "benefit of the bargain," *e.g.,* lost profits, would fit the facts because the issue was not raised.

2. Evidence of Lost Future Profits Was Not Speculative

Jacobs contends that the evidence of lost future profits was speculative, and, therefore, there was no evidentiary basis for the award of lost future profits.

Generally, recovery of anticipated profits of a commercial business is not allowed because the existence and amount of lost future profits is too remote, speculative and dependent upon changing circumstances. *Coonis v. Rogers,* 429 S.W.2d 709, 714 (Mo. banc 1968); *Mills v. Murray,* 472 S.W.2d 6, 16-17 (Mo.App.1971). Nevertheless, anticipated profits may be recovered when they are made reasonably certain by proof of facts permitting a rational estimate of their amount. *Coonis,* 429 S.W.2d at 714; *Gasser v. John Knox Village,* 761 S.W.2d 728, 731-732 (Mo.App.1988). Although the estimate of loss may not be based on speculation or conjecture, *John Knox Village,* 761 S.W.2d at 732, a wrongdoer will not

be allowed to escape liability because the amount of resulting loss is not susceptible of exact proof. *Denton Const. Co. v. Missouri State Highway Commission,* 454 S.W.2d 44, 56 (Mo. banc 1970); *Scullin Steel Co. v. PACCAR, Inc.,* 708 S.W.2d 756, 761 (Mo.App.1986).

Jacobs argues that Brown's future profit claim was based on Dr. Pflaum's speculation that there was a correlation between Brown's sale of Jake Brakes and the sale of Class 7 and 8 trucks in the United States. Although the basis for Pflaum's correlation theory was vigorously attacked on cross-examination, the jury was properly left to determine whether they believed Dr. Pflaum's conclusion after plaintiff's challenge to the basis for it. A reasonable jury could conclude that there was a correlation between the defendant's sales of Jake Brakes and the sales of large trucks.

Similarly, other parts of defendant's lost profits analysis were attacked on cross-examination. Plaintiff's counsel developed good material to use in arguing that defendant's conclusions about lost profits were not persuasive. The jury was properly allowed to weigh the evidence.

3. Loss of Future Profits Was Not Directly Caused by Any Misrepresentation

Jacobs argues that Brown failed to prove that the loss of future profits was proximately caused by any of the alleged fraudulent or negligent misrepresentations because Brown was offered a distribution agreement for 1984 but declined to sign it.

To be recoverable under either a fraud or negligence theory, lost future profits damages must be shown to be a direct consequence of the misrepresentation. The misrepresentation must be the proximate and not the remote cause of the damages. *Heberer v. Shell Oil Co.,* 744 S.W.2d 441, 443-444 (Mo. banc 1988); *see Quality Wig Co. v. J.C. Nichols Co.,* 728 S.W.2d 611, 618 (Mo.App. 1987).

In light of the previous analysis, Jacobs' argument can be rephrased as follows: Brown failed to present evidence from which a reasonable jury could conclude that Brown suffered a loss of future profits as a direct result of Jacob's representation that it was not considering changing its method of distributing the Jake Brake.

Whether there was proximate cause is a jury question so long as there is evidence from which a reasonable jury could find proximate cause. I do not believe that a reasonable jury could have concluded that the "not considering" misrepresentation directly caused a loss of future profits because 1) Brown knew that Jacobs was considering changing its method of distribution as early as July 28, 1982, 2) Brown knew that each of the written agreements Brown signed allowed Jacobs to sell directly to OEMs, 3) direct sales to OEMs was one of Brown's biggest problems with the changes Jacobs implemented and 4) Brown was so vague about why he did not agree to the 1984 distributorship agreement that was offered to him.

4. Brown Did Not Waive Claim for Lost Future Profits

The following waiver clause appears in all eight distributorship agreements signed by Brown:

> Upon termination, no indemnity shall be payable to the Distributor for loss of profits, good will, and the like, or for advertising costs, termination of employees, employees' salaries and the like, and the Distributor hereby expressly waives any rights he may have under law to receive such indemnity.

See, e.g., Tab 5, Plaintiff's Appendix to Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial.

Jacobs contends that by suing for damages, Brown has elected to affirm the contract and, accordingly, must be bound by the waiver-of-damages clause in that contract.

Upon discovery of a fraud, the defrauded party has a choice of remedies. The contract may be rescinded and recovery had for what was paid or the contract may be affirmed and recovery had for the damages caused by the fraud. The defrauded party cannot pursue to a final conclusion both a claim for rescission and a claim for damages. The defrauded party cannot both affirm and disaffirm the contract. *Centerre Bank of Kansas City, N.A. v. Distributors, Inc.*, 705 S.W.2d 42, 51 (Mo.App.1985); 25 Am.Jur.2d, Election of Remedies, § 27 (1966).

Thus, Jacobs is correct that by suing for damages for fraud, Brown has affirmed the contract. Brown's argument to the contrary misconstrues the authority it cites. Brown relies primarily upon *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 290 (8th Cir.1990):

> Under Missouri law, a party who is the victim of fraud in the inducement of a contract may choose among three avenues of relief. The party may: (1) rescind the contract and seek restoration of the status quo; (2) affirm the contract and pursue whatever contractual remedies may be available; or (3) bring an action seeking damages for the asserted fraud.

Brown argues that seeking damages for fraud—the third option listed in *Western Fireproofing*—requires neither an affirmance nor a disaffirmance of the contract. Thus, Brown asserts that it did not affirm the contract by seeking damages for fraud. Therefore, the waiver of damages clause in the contract does not apply.

The Supreme Court of Missouri disagrees:

> By bringing an action for damages for fraud, the defrauded party elects to treat the contract as subsisting, and, in effect, affirms it, thereby consenting to be bound by its provisions, without releasing or waiving his claim for damages arising from the fraud.

Johnson v. Bray, 31 S.W.2d 998, 1001 (Mo. banc 1930).

The third option in *Western Fireproofing* should be: "(3) *affirm the contract and* bring an action seeking damages for the asserted fraud." Option three is distinguishable from option two by the *form of remedy*. Options two and three both affirm the contract, but option two involves a *contract* remedy, whereas option three involves a *tort* remedy.

Thus, Brown affirmed the contract by electing to seek damages for fraud.

Jacobs correctly asserts that a damage waiver provision generally is not against public policy is Missouri, *see* Mo. Rev.Stat. § 400.2-719(3). However, the issue is not whether such a clause generally is enforceable in an action based on contract, but whether it is enforceable in an action based on fraud. "It is well settled, of course, that the law will not sustain a covenant of immunity which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, or relieves one of a duty imposed by law for the public benefit." *United States v. United States Cartridge Co.*, 198 F.2d 456, 464 (8th Cir.1952), *cert. denied*, 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345 (1953). A party to a contract cannot, by misrepresentation of a material fact, induce the other party to enter into the contract to his damage, and then protect himself from the legal effect of such misrepresentation by inserting a clause in the contract to the effect that he is not to be held liable for the misrepresentation. *See Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66 (Mo.App.1968); *Slater v. KFC Corp.*, 621 F.2d 932, 936 (8th Cir.1980).

Assuming that Jacobs had presented evidence from which a reasonable jury could have concluded that the elements of a claim for fraudulent misrepresentation had been established, the contractual waiver provision relied upon by Jacobs would not prevent recovery of lost future profits.

E. *Brown Did Not Waive Claim for Southern Region Losses*

In addition to the future profits for the years 1984 through 1988, the jury awarded Brown $271,155.35 in out-of-pocket losses for the southern region. Jacobs contends that Brown waived its claim to these losses 1) during Brown's opening statement and 2) during a discussion of an evidentiary objection at the bench.

Brown maintains that it waived only "capital expense and investment losses in the Southern Region, *not* out-of-pocket losses." Further, Brown contends that even if it waived out-of-pocket losses for the Southern Region in the manner asserted by Jacobs, Jacobs subsequently waived the waiver by not objecting to Brown's request in Brown's closing argument for out-of-pocket losses for the Southern Region.

Generally, admissions of fact made by counsel are binding upon their principals so long as they are unequivocal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3rd Cir.1972); *Wieder v. Towmotor Corp.*, 568 F.Supp. 1058, 1063 (E.D.Pa.1983), *aff'd*, 734 F.2d 9 (3rd Cir. 1984). Where, however, a doubt exists as to the purported admission, the issue may not be removed from the jury's consideration. *Id.*; *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 484 (3rd Cir.1965).

I agree that Brown's counsel waived a claim for Southern Region losses in his opening statement and during the bench conference relied upon by Jacobs. (I allowed the testimony about the investment in the Southern Region only as an aide to the jury in making a determination about lost future profits.) *However*, the clarity of that waiver was destroyed by later events during the trial, i.e., Bernard Brown's testimony quoted by defendant in Doc. 238 at 39-40, Group Exhibit E, the stipulation as to Group Exhibit E and defendant's closing argument. Therefore, I believe that the issue of Southern Region losses was properly left to the jury.

F. *Jury Award For Punitive Damages Should Be Vacated*

The jury awarded Brown $2,700,000 in punitive damages. Jacobs argues that the award (1) violates due process, (2) was not supported by sufficient evidence, and (3) violates equal protection.

1. Due Process

Jacobs asserts that Missouri law on punitive damages violates procedural due process because Missouri law (a) is unconstitutionally vague as to the type of conduct that renders one liable to punitive damages, (b) provides no meaningful guidelines for or limitations on the fact finder in determining the amount of punitive damages, and (c) requires the wrong standard of proof.

a. *Missouri Standard Defining Conduct Subject To Punitive Damages Is Not Unconstitutionally Vague*

Jacobs contends that Missouri law is unconstitutionally vague in describing the type of conduct that exposes one to punitive damages liability. According to Jacobs, Missouri requires a "willful, wanton or malicious culpable mental state" in order to award punitive damages. Jacobs contends, however, that the Missouri Supreme Court has not defined the specific conduct which violates this standard or otherwise given guidance to a jury about what conduct would support an award of punitive damages. Jacobs contends that the "overwhelming uncertainty" about what conduct satisfies the Missouri standard makes the Missouri standard unconstitutionally vague.

In *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc. 1989), the Missouri Supreme Court discussed at length the purpose of punitive damages and the level of malice required to support an award of punitive damages:

> Justified as punishment and intended to make an example of a defendant on account of his outrageous

> conduct, puniitve damages require a showing of a culpable mental state on the part of the defendant, either by a wanton, willful or outrageous act or reckless disregard (from which evil motive is inferred) for an act's consequences. 'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others.' [Citation omitted.] It is not so much the commission of the intentional tort as the conduct or motives—the defendant's state of mind—which prompted its commission that form the basis for a punitive damage award. . . . Plaintiff must prove the defendant's evil hand was guided by an evil mind.

The court set forth the form and content of a proper punitive damages jury instruction "in language readily understood by lawyers and lay people alike," *id.* at 789, so that a jury of lay people could properly determine "conduct for which punitive damages are appropriate." *Id.*[2]

In *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972), the United States Supreme Court stated that:

> Vague laws offend several important values. First, because we assume that man is free to steer between

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[2] "Henceforth, MAI 10.01 should read:

> If you find the issues in favor of plaintiff, and if you believe the conduct of the defendant as submitted in Instruction Number —— (here insert number of plaintiff's verdict directing instruction) was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number ——, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter him and others from like conduct."

Burnett, 769 S.W.2d at 789.

> lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

To succeed on a claim of vagueness in violation of due process, the complainant "must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.E.2d 362 (1982).

Jacobs argues that the standard for imposing punitive damages does not afford sufficient notice of the types of conduct that may subject the defendant to punitive damages. This argument addresses a different issue than that addressed in *Grayned*. There, the issue was reasonable notice of prohibited conduct. Vague laws offend because they do not allow us to "steer between lawful and unlawful *conduct*." Here, Jacobs is not arguing that the law gives insufficient notice of prohibited conduct. Jacobs is not arguing, for example, that the law does not sufficiently inform it that fraudulent conduct is prohibited. Jacobs is actually arguing that the law gives insufficient notice of the precise *punishment* for conduct that Jacobs knew was prohibited.[3] Jacobs' argument raises the question of whether the vagueness doctrine applies to punishment.

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[3] Jacobs' "void for vagueness" argument is also unusual in that the vagueness doctrine generally applies to *statutes*, not to *caselaw*. Jacobs is complaining here that court-created standards for punitive damages are unduly vague.

Vague sentencing provisions may present constitutional questions if they do not state with sufficient clarity the punishment for violating a *criminal* statute. *United States v. Batchelder,* 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979). I am cited to no authority, and my own research has revealed no authority, that applies the vagueness doctrine to the standard for civil *punishment.* Because punitive damages are penal in nature, however, it will be assumed for the purposes of this analysis that the vagueness doctrine applies to the standard for awarding punitive damages.

Under *Grayned,* it is necessary to determine whether the law gives reasonable notice of prohibited behavior to potential wrongdoers and provides explicit standards to those who apply the law. The Supreme Court has stated that "a scienter requirement may mitigate at law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Flipside,* 455 U.S. at 498, 102 S.Ct. at 1193.

The jury instruction adopted by the Missouri Supreme Court in *Burnett* requires that there be some element of outrage to justify punitive damages, that conduct is "outrageous" because of "evil motive or reckless indifference" and that the purpose of punitive damages is to punish and deter. As expressed in *Burnett,* Missouri's standard for the award of punitive damages provides a sufficient scienter requirement to give guidance to potential wrongdoers and to juries as to what conduct supports an award of punitive damages. The Missouri punitive damages standard is not unconstitutionally vague.

b. *Instruction 15 Did Not Inform the Jury of Missouri's Standards for Determining the Amount of Punitive Damages*

Jacobs next asserts that (i) because there are no standards for the jury to apply in setting the *amount* of a punitive damages award, and (ii) because there is no upper

limit on the *amount* of punitive damages that may be awarded, the determination of the amount of punitive damages awarded is committed solely to the unfettered discretion of the jury.

In Missouri, the jury has great discretion in fixing the amount of punitive damages:

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. App.1971). "[A] hard and fast rule for the measuring of [punitive] damages cannot be declared." *Wheeler v. Community Federal Sav. and Loan Assoc.*, 702 S.W.2d 83, 87 (Mo.App.1985) (quoting *Sperry v. Hurd*, 267 Mo. 628, 185 S.W. 170, 174 (1916).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the fuutre. *State ex rel. Smith v. Greene,* 494 S.W.2d 55 (Mo. banc 1973); *Boyer v. Grandview Manor Care Center, Inc.*, 759 S.W.2d 230 (Mo.App.1988). In addition, punitive damages must have some reasonable relation to the injury inflicted and the cause thereof. *State ex rel. St. Joseph Belt R. Co. v. Shain,* 341 Mo. 733, 108 S.W.2d 351, 356 (1937); *Wheeler,* 702 S.W.2d at 88; *Holcroft v. Missouri-Kansas-Texas R. Co.*, 607 S.W.2d 158, 163 (Mo.App. 1980).

In this case, Instruction 15 gave the jury the only guidance it had on what conduct would justify the imposition of punitive damages *and* how to determine the amount of punitive damages to award. Instruction 15 conforms to

Missouri Approved Instruction 10.01, as revised by *Burnett*, 769 S.W.2d at 789.

> If you find in favor of Sam Brown Company on the fraudulent misrepresentation claim in Instruction 12 and if you believe the conduct of Jacobs Manufacturing Company as submitted in Instruction 12 was outrageous because of Jacobs Manufacturing Company's evil motive or reckless indifference to the rights of Sam Brown Company, then in addition to any damages to which you find Sam Brown Company entitled under Instruction 14, you may award Sam Brown Company an additional amount as punitive damages to punish Jacobs Manufacturing Company and to deter Jacobs Manufacturing Company and others from like conduct. Please check the appropriate blank on Verdict A.
>
> If you unanimously agree that punitive damages should be awarded against Jacobs Manufacturing Company, there will be a further short proceeding in the courtroom before you deliberate on the amount of punitive damages.

On its face, Instruction 15 does not incorporate the Missouri requirement that the amount of punitive damages awarded must have a reasonable relation to the inquiry inflicted and the conduct that caused the injury. However, the Missouri Supreme Court approved this instruction presumably being fully aware of the Missouri decisions requiring a reasonable relationship between the amount of punitive damages awarded and the injury inflicted and the conduct that caused that injury. Because the Missouri Supreme Court did not overrule the decisions establishing the need for this relationship, I assume that the Missouri Supreme Court must have assumed that the need for this relationship was inherent in the concept of punishment. If that was the Missouri Supreme Court's thinking, it is far too obtuse for the average juror to appreciate. Without expressly stating the need for the relationship, a jury

would not realize that any award of punitive damages must have a reasonable relationship to the harm caused and the conduct causing the harm.

If a "preponderance of the evidence" burden of proof is used for determining liability for punitive damages, due process requires that during post-judgment review of punitive damage awards, consideration must be given to whether the amount of punitive damages awarded was reasonably related to the harm that was caused by the conduct being punished. (*See* discussion in next section of this opinion.) To make this post-judgment review both an effective constraint and consistent with a jury's role as factfinder, the jury must be told that it must consider this relationship in determining the amount of punitive damages. Otherwise, the jury's decision is being reviewed for conformity with a standard it never considered.

Under this analysis, Instruction 15 is fatally defective because it did not provide the jury with any guidance in how to determine the amount of punitive damages to be awarded.

C. *Because of the Defect in Instruction 15, the Instructions Did Not Provide a Sufficient Constraint on the Exercise of the Jury's Discretion*

Jacobs next argues that due process requires a heightened standard of proof for punitive damages and suggests that "clear and convincing" is the appropriate standard.

The Missouri Supreme Court has rejected this standard: "The defendant argues that punitive damages submissions should require 'clear and convincing' evidence. This requirement is contrary to our normal requirements in the submission of civil cases. We are not disposed so to hold, or to follow cases from other jurisdictions so holding." *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990).

In *Pacific Mut. Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the United States Supreme Court stated that "as long as the [punitive damages factfinder's] discretion is exercised within reasonable constraints, due process is satisfied." *Haslip*, 111 S.Ct. at 1044. The Court suggested that the absence of adequate procedural and substantive restraints on jury discretion might require a burden of proof greater than "preponderance of the evidence." *Haslip*, 111 S.Ct. at 1046 n. 11.

In evaluating the procedure for awarding punitive damages in Alabama the Court noted two constraints that controlled jury discretion. First, the trial court properly explained the deterrent and punishment purposes of punitive damages. *Id.* at 1044. Second, both the trial court and the appellate court applied independent substantive criteria of review required by Alabama law (even to the extent of considering evidence that was not before the jury) to ensure that the award was reasonable in amount and rational in light of the purposes of punitive damages to punish and deter. *Id.* at 1044-1045. The Supreme Court held that this post-trial review of punitive damage awards, in conjunction with a proper instruction to the jury, provided an adequate constraint on jury discretion to satisfy due process. Therefore, a "preponderance of the evidence" burden of proof was acceptable. *Id.* at 1046 n. 11.

In *Haslip*, the punitive damages were awarded in state court and the post-judgment review was conducted by state courts. In a diversity case in federal court, a district court must apply the substantive law of the state when instructing the jury on punitive damages. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The standards for post-judgment review, however, are supplied by federal law. Post-judgment review by the district judge is governed by standards established for applying Rules 50(b) (directed verdict and j.n.o.v.) and 59 (new trial). Therefore, federal court

review of a punitive damage award in a diversity case involves application of the constraints placed on jury discretion both by state substantive law and by the standards governing federal post-trial review.

> Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 2922, 106 L.Ed.2d 219 (1989).

Therefore, I must determine whether there were sufficient constraints on jury discretion in this case.

In instructed the jury substantially in compliance with the law of Missouri. Instruction 15 informed the jury that (i) the imposition of punitive damages was not mandatory, (ii) the purpose of punitive damages was to punish and to deter Jacobs and others from like conduct and (iii) whichever fraudulent misrepresentations(s) the jury believed were made had to amount to "outrageous conduct" resulting from an "evil motive or reckless indifference to the rights of others." Although Instruction 15 gives adequate guidance to the jury in determining whether to award any punitive damages, it fails to give the jury guidance about how to determine the amount. (*See, e.g.*, the last paragraph of the instruction to the jury in *Haslip*, 111 S.Ct. at 1037 n. 1: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing simi-

lar wrong.") Consequently, the substantive constraints placed by Missouri law upon this jury do not satisfy due process.

d. *Under the Standard of Review Required by Due Process, the Punitive Damage Award Must be Vacated for Lack of Evidentiary Basis*

Turning to the constraints on jury discretion by post-trial review by this court and the Court of Appeals, the Supreme Court has described the district court's role in reviewing a punitive damages award:

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. Courts of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

Browing-Ferris, 492 U.S. at 279, 109 S.Ct. at 2922.

Federal court post-judgment review under Rules 50(b) and 59 is more deferential to jury verdicts than post-judgment review in Alabama. Under Rule 50(b), judgment notwithstanding the verdict should be granted only when the evidence, viewed in the light most favorable to the prevailing party, "points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.*, 869 F.2d 1155, 1159-1160 (8th Cir.), *cert. denied,* 493 U.S. 848, 110 S.Ct. 145, 107 L.Ed.2d 104 (1989). Under Rule 59, a new trial may not be granted on the ground that a jury's verdict is excessive unless the court concludes that the jury's verdict is a "plain injustice" or a "monstrous" or "shocking" result. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d

470, 475 (8th Cir.1987). In light of *Haslip,* does review under these standards provide sufficient restraint on the jury's discretion to satisfy due process?

In order for post-trial review in this case to be "meaningful and adequate" and, therefore, an additional check on the jury's discretion, consideration must be given to those aspects of the Alabama review process that the Supreme Court in *Haslip* concluded provided meaningful review.

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 111 S.Ct. at 1045.

I am persuaded that if post-judgment review of punitive damage awards in diversity cases is to be a meaningful restraint on a fact finder's discretion, factors such as these must be utilized in post-judgment review. If they are, the heightened standard of proof proposed by Jacobs is not necessary. If they are not, a heightened standard of proof is necessary to afford plaintiff due process.

For the reasons already discussed in this opinion, the issue of punitive damages never should have been pre-

sented to the jury because, as a matter of law, defendant's counterclaim for fraudulent misrepresentation should not have been submitted to the jury. Even if the fraudulent misrepresentation claim had been properly submitted, punitive damages of $2.7 million dollars in this case can only be the result of passion and not the result of the exercise of reasoned discretion. A reasonable mind reviewing this evidence could not find "reckless disregard (from which evil motive is inferred)" for the consequences of plaintiff's behavior with regard to the distributorship relationship with defendant.

Each year the defendant, through its highly educated, experienced president, with ready access to legal counsel, agreed in writing to the terms that would govern the business relationship with plaintiff. In each of the yearly agreements, Brown agreed that the agreement would only be one year in duration and that the written agreement contained all the parties' promises to each other. In this case, defendant's position was that the terms of its solemn, written agreement were meaningless. Instead of the written agreement, defendant contended that it took sales talk, *e.g.*, "we expect our relationship to last forever," as a promise and relied upon it over the terms of the written agreement. Under these facts, a reasonable jury could not fairly conclude that plaintiff's conduct was either outrageous or so reckless as to permit an inference of evil motive.

Also, the amount of punitive damages awarded by the jury was so unrealistic as to demonstrate irrational rather than reasonable behavior. If defendant suffered any harm, it was the result of causes such as poor economic conditions or poor management rather than plaintiff's behavior. A punitive damage award of $2.7 million dollars in addition to a judgment for all the actual damages claimed by defendant bears no rational relationship to the harm likely to result or to the harm that actually occurred.

2. Equal Protection

a. *Missouri Standards for the Assessment of Punitive Damages Do Not Violate the Equal Protection Clause*

Jacobs makes two arguments to support its assertion that punitive damages, as currently imposed, violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. First, Jacobs asserts that punitive damages are penal in nature and serve the same functions as criminal punishment. Jacobs argues that because none of the procedural safeguards afforded to criminal defendants are afforded to punitive damages defendants,[4] punitive damages defendants are discriminated against in relation to criminal defendants.

The action of state courts and of judicial officers in their official capacities is action of the state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14, 15, 18, 68 S.Ct. 836, 842, 843, 844, 92 L.Ed. 1161 (1948). The action of state courts in enforcing a substantive common-law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings may have been in complete accord with the most rigorous conceptions of procedural due process. *Shelley*, 334 U.S. at 17, 68 S.Ct. at 844.

Generally, the constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973). State action is subjected to a higher level of scrutiny only if the classification interferes with the exercise if a fundamental right, *e.g.*, the right of privacy, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

[4] Jacobs does not specify which procedural protections, being absent, require a finding of unconstitutionality.

(1973); the right to vote, *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); rights guaranteed by the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); or the right to procreate, *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), or operates to the peculiar disadvantage of a suspect class, *e.g.*, alienage, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); race, *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); or ancestry, *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948).

Defendants against whom punitive damages are sought do not constitute a suspect class. No fundamental rights of the type discussed in the decisions in this area are implicated by the imposition of punitive damages. Thus, "rational basis" is the appropriate constitutional standard to be applied here. *San Antonio*, 411 U.S. at 55, 93 S.Ct. at 1308.

Punishment and deterrence of outrageous conduct inspired by an evil motive or reckless indifference to the rights of others are legitimate state state interests, and the imposition of punitive damages rationally furthers these interests.

As the predicate for Jacobs' second argument, Jacobs asserts that recovery of additional damages in some categories of civil cases, such as antitrust, is limited to a *multiple* of compensatory damages, whereas the recovery of punitive damages awards in other categories of civil cases is *unlimited*. Therefore, Jacobs argues that defendants against whom punitive damages are sought in the latter cases are discriminated against as compared to "additional damages" defendants in the former cases. Jacobs asserts that there is no rational basis for such discrimination.

Again, defendants against whom punitive damages are sought do not constitute a suspect class and no fundamental rights are implicated by the imposition of punitive damages.

On the record presented, I cannot say that the state's purposes in allowing punitive damages to be assessed are not rationally furthered by Missouri's decision not to place a cap on punitive damage awards. Any cap might prevent the purposes of punitive damages from being realized when the defendant is wealthy. A mandatory multiplier might be ineffectual when the other damages are nominal. Missouri's failure to put a cap on the amount of punitive damages that may be awarded by a jury rationally furthers the interests of punishment and deterrence.

Jacobs' equal protection challenge is meritless.

G. *Conclusion*

Jacobs' motions for directed verdict and judgment notwithstanding the verdict on Brown's claim for fraudulent misrepresentation will be granted because Brown failed to present evidence sufficient to support each element of the claim. Jacobs' motions for directed verdict and judgment notwithstanding the verdict on Brown's claim for negligent misrepresentation will be granted because no cause of action exists for negligent misrepresentation of future intent. Assuming that a cause of action for negligent misrepresentation of future intent exists. Brown failed to present evidence sufficient to support each element of the claim.

Even if Brown had presented evidence sufficient to support a claim of fraudulent misrepresentation and/or a claim for negligent misrepresentation of future intent existed and was supported, 1) the jury's award of lost future profits will be vacated because no reasonable jury could find on the basis of the evidence presented that the

claimed lost profits were proximately caused by any of Jacobs' alleged misrepresentations; 2) the jury's award of punitive damages will be vacated because Instruction 15 did not properly inform the jury about Missouri's standards for determining the amount of punitive damages; and 3) the jury's award of punitive damages will be vacated because no reasonable jury could conclude that plaintiff's conduct was either outrageous or so reckless as to permit the inference of an evil motive.

II. MOTION FOR NEW TRIAL

Jacobs has moved for a new trial as an alternative to its motion for judgment notwithstanding the verdict. Having granted Jacobs' Motion for Judgment Notwithstanding the Verdict, it is unnecessary to rule on Jacobs' Motion for a New Trial. However, in order to facilitate complete review on appeal, I will rule on the new trial motion.

A. *Standard of Review*

A new trial may be granted if there is not substanital evidence to support the verdict. A new trial should be granted to prevent a miscarriage of justice. *California & Hawaiian Sugar*, 602 F.Supp. at 186.

The burden of proving harmful errors is on the party seeking the new trial. *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179 (8th Cir.1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed.2d 592 (1973). In considering a motion for a new trial, the evidence need not be viewed in the light most favorable to a nonmoving party. *Bates v. Hensley*, 414 F.2d 1006, 1011 (8th Cir.1969). In order to grant a new trial, I must conclude that the jury reached a seriously erroneous result. *Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir.1990).

Although I have discretion to grant a new trial based upon my assessment of the evidence, I "cannot usurp the

functions of the jury. The district court can only disturb a jury verdict to prevent a miscarriage of justice. The verdict must be against the 'clear weight,' 'overwhelming weight,' or 'great weight' of the evidence for a new trial to be granted." *Beckman v. Mayo Foundation*, 804 F.2d 435, 439 (8th Cir. 1986).

Jacobs asserts four grounds for a new trial: 1) the jury's verdict for actual and punitive damages was without any evidentiary basis, 2) the jury's verdict was erroneously inconsistent, 3) the jury's findings set forth in special interrogatories were without evidentiary basis, and 4) the Court erroneously allowed Brown's waived claim for monetary losses for the Southern Region to go to the jury. With the exception of the initial Suggestions in Support of Jacobs' motion, the parties discussed the issues raised by the new trial motion (if they were discussed at all) along with the issues raised by the Motion for Judgment Notwithstanding the Verdict. Similarly, my analysis of the issues raised by the Motion for Judgment Notwithstanding the Verdict reliably predicts the outcome of the new trial motion even under the different standard.

B. *Punitive Damages Verdict Lacked Evidentiary Basis*

Jacobs contends that the jury's verdict for actual and punitive damages was without any evidentiary basis and, therefore, was rendered because of bias or prejudice and/or because of the jury's failure to follow the court's instructions. For all of the reasons previously discussed, there was not substantial evidence supporting the award of punitive damages.

C. *The Verdict was Erroneously Inconsistent*

Jacobs contends that the jury's verdict was erroneously inconsistent in that representation "c" in Instructions 12 and 13 (referred to in this opinion as the third alleged misrepresentation) was found to be both a fraudulent and negligent misrepresentation. Jacobs argues that this dem-

onstrates that the jury was biased or prejudiced and/or that it failed to follow the court's instructions.

Any single representation cannot be both fraudulent and negligent because of the difference between the scienter element of these distinct legal theories. "[T]he theories underlying fraud and negligence are antithetical. An act or failure to act cannot be both intentional and unintentional." *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1374 (8th Cir.1989); *see also Restatement (Second) of Torts*, § 528 (1977).

Special answers or findings by the jury must be consistent with each other, and if they are irreconcilably inconsistent, they destroy each other.[5] *Robertson*, 871 F.2d at 1373. In this situation, both the negligence and the fraud verdicts must be vacated and the issues re-tried. *Id.* at 1375.

Here, because the jury found the third alleged misrepresentation to be both fraudulent and negligent, Jacobs is entitled to a new trial on that representation.

D. *Jury's Findings as to Brinkerhoff and Kennedy Lacked Evidentiary Basis*

Jacobs contends that the jury's findings set forth in the Court's special interrogatories submitted as Instructions 22 and 23, which identified P. Brinkerhoff and E. Kennedy as Jacobs' employees who satisfied paragraph Third and Fourth of Instructions 12 and 13, respectively, were without evidentiary basis. Therefore, Jacobs argues that the jury's verdict were rendered because of bias or prejudice and/or because of the jury's failure to follow the Court's instructions.

Defendant points to no specific evidence about Brinkerhoff or Kennedy that would support the jury's conclusion.

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[5] In *Robertson*, as here, the jury was not instructed that it could return a verdict on only one of the two theories. *See Robertson*, 871 F.2d at 1375.

Defendant argues that the jury's conclusion was supported by the position each held with Jacobs.

Although I do not have a transcript of the proceedings, my notes and recollection of the evidence support Jacobs' conclusion that there was no evidenec from which a reasonable jury could conclude that the evidence about Brinkerhoff and Kennedy satisfied paragraphs Third and Fourth of Instructions 12 and 13. Neither Brinkerhoff nor Kennedy's position with Jacobs by itself provides a sufficient evidentiary basis for the jury's conclusion.

Jacobs does not challenge the adequacy of the evidentiary basis for the jury's conclusion about the other men listed by the jury in response to Instructions 22 and 23. However, the jury's inclusion of Brinkerhoff and Kennedy in its responses to these Special Interrogatories is another indication that the jury was not following instructions but was proceeding by emotion. When asked to respond to Instructions 22 and 23, the jury may well have listed all the names of Jacobs' employees which they could remember. Although this ground by itself would not warrant a new trial, it supports the grant of a new trial based on other grounds.

E. *Brown Did Not Waive Claim For Southern Region Losses*

Jacobs contends that counsel for Brown waived in his opening statement any claim by Brown for damages for alleged monetary losses in the southern region. Therefore, Jacobs argues that there was no lawful evidence supporting the jury's award of such damages.

For the reasons already discussed in this order, it was not error to submit this claim to the jury and there was substantial evidence to support the jury's decision.

F. *Conclusion*

For all of the reasons set forth in this opinion, the jury reached a seriously erroneous result in this case under the evidence presented to it. Emotion rather than reason appears to have directed this jury. In fact, defendant's case on its counterclaim appeared to be based to a large extent on appeals to emotion as a means of avoiding the terms of written agreements. Repetition of concepts like small company versus big company, local company versus foreign company and "boilerplate" distracted the jury from a rational consideration of the evidence and from a careful application of the law as stated in the instructions.

III. ORDER

For the foregoing reasons, it is ORDERED that:

1) Jacobs' Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict on Defendant's Counterclaim for Fraud and Negligent Misrepresentation is granted; and

2) in the alternative, Jacobs' Motion for New Trial is granted.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834 WM

THE JACOBS MANUFACTURING COMPANY,
Appellee

v.

SAM BROWN COMPANY,
Appellant.

MOTION AND SUPPORTING MEMORANDUM FOR AMENDMENT OF MANDATE

Appellant Sam Brown Company ("Appellant") by and through counsel, hereby moves, pursuant to Federal Rule of Appellate Procedure 37, for amendment of the mandate of this Court in the above-referenced proceeding to instruct the district court to enter judgment in favor of Appellant in accordance with the jury's verdict on Appellant's fraudulent misrepresentation counterclaim (the "Counterclaim"), together with post-judgment at the rate of 7.95% from and after September 12, 1990, computed daily and compounded annually, on the ground that this Court should exercise its discretion to allow post-judgment interest from the date of entry of judgment on the jury's verdict in that equity and standard practice require such a result, all as more fully set forth in the suggestions supporting this Motion included herein.

FACTS

On March 28, 1994, this Court entered its opinion which, *inter alia,* reversed the judgment of the court below granting judgment as a matter of law on the Counter-

claim. Prior to that decision of the court below, a jury had found for Appellant on the Counterclaim in the amount of $2,491,792.35 in compensatory damages and $2,700,000.00 in punitive damages. The jury award was entered as a judgment on September 12, 1990.

This Court has now denied *en banc* and panel rehearing. The Court also denied, on July 28, 1994, Appellee's motion to stay issuance of the mandate. The Clerk of this Court has taxed costs of $1,334.01 in favor of Appellant. The district court received this Court's mandate [1] on August 1, 1994, but has not, as of the date of this Motion, entered judgment thereon. The judgment of this Court provides "the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded with directions in accordance with the opinion of this Court." The Court's opinion states "[w]e remand to the district court with instructions to enter judgment in favor of Brown in accordance with the jury's verdict on Brown's fraudulent misrepresentation counterclaim." *Jacobs Manufacturing Company v. Sam Brown Co.*, 19 F.3d 1259, 1267 (8th Cir. 1994). There is no provision in either the judgment or opinion with respect to post-judgment interest.

ARGUMENT

The mandate of the Court provides no direction with respect to post-judgment interest on the Counterclaim. Federal Rule of Appellate Procedure 37 states, in part, that:

> [i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Appellee respectfully suggests to the Court that post-judgment interest on the Counterclaim be allowed as of

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[1] The mandate consists of a certified copy of this Court's judgment and opinion, pursuant to Federal Rule of Appellate Procedure 41(a).

the date of entry of the jury's verdict thereon, as there is no other equitable manner of exercising this Court's discretion on this point.

Appellant reminds the Court that it has been over eleven years since Appellee terminated its distributorship program, completing the chain of deception practiced against distributors such as Appellant, and resulting lost profits in excess of $2,400,000.00 which Appellant has yet to recover. It has been ten years since the filing of this lawsuit, and almost four years since judgment was entered on the Counterclaim, Appellant's only form of recompense for wrongs done. Appellee has had the use of the funds representing payment of the judgment for long before and after the completion of its fraud against Appellant. While pre-judgment interest is not allowed to Appellant in this case, it is only just that post-judgment run from the date of entry of the jury's verdict simply as partial recompense for Appellee's continued use of funds that should have been used to pay Appellant's judgment.

Moreover, it is well accepted that, in the exercise of discretion by an appellate court with respect to interest on a judgment to be reinstated after appeal, the standard practice is to direct that interest be awarded from the date of the judgment to be reinstated. One of the most recent examples of this practice is found in *DeLong Equipment Company v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir. 1993). The facts are almost identical to those in the instant proceeding:

> On May 17, 1993, we issued an opinion in this case reversing the district court's grant of a new trial on Sherman Act antitrust and common law fraud claims, 990 F.2d 1186. That decision will result in the reinstatement of jury verdicts in favor of the plaintiff, DeLong Equipment Co. ("DeLong"), for $6,099,885 (after trebling) on the Sherman Act claim and for $117,824 on the common law claims.

> Our original opinion contained no instructions to the district court concerning the award of postjudgment interest. Consequently, DeLong has moved that we amend the mandate to indicate that interest should be awarded from the date of the original judgment.

DeLong Equipment at 1341.

In amending its mandate to allow interest from the date of the original judgment, the court found two primary grounds to do so. First,

> it is necessary to protect the integrity of the jury verdict. The jury in this case awarded DeLong approximately $6 million as of September, 1990, not $6 million as of May, July or August, 1993. The value of six million September, 1990 dollars is not $6 million today, but what $6 million would have grown to in the interim. Since we have not held that the jury awarded DeLong more than it should . . ., we should not undermine the jury verdict by refusing to grant the interest necessary to maintain its value.

DeLong Equipment at 1342. Second, the defendant had been able to use the $6 million for its own benefit during the appeal period. Accordingly, defendant would have received a windfall, and plaintiff a penalty, if defendant were not required to pay interest from the date of the original judgment, all because "the district court erroneously set aside the earlier judgment. . . ." *DeLong Equipment* at 1342.

The same analysis applies in this case. The value of the judgment awarded by the jury is the principal amount, together with interest from the date of the original judgment. This Court did nothing with the original judgment and verdict other than direct that it be reinstated. In the meantime, Appellee has had use of the monies required to pay the judgment. It would violate the principles of equity to allow Appellee the benefit of the accrued interest when this Court has squarely held that the original

judgment should not have been set aside by the district court. This accrued interest is not insubstantial. The judgment interest rate on September 12, 1990, was 7.95%. As of August 2, 1994, accrued interest at that rate upon $5,191,792.35 was $1,801,611.63. Accordingly, the Court's failure to direct assessment of post-judgment interest in Appellant's favor from and after September 12, 1990, was no doubt a procedural oversight which should now be corrected.

Other courts of appeal have adopted the result set forth in *DeLong Equipment*. *See Cordero v. Jesus-Mendez*, 922 F.2d 1, 16-18 (1st Cir. 1990); *Smith v. National Passenger Railroad Corporation*, 856 F.2d 467, 472-473 (2d Cir. 1988).

Appellant requests that this Court amend its mandate to provide for post-judgment interest on the Counterclaim. Pursuant to 28 U.S.C. § 1961(b), interest is computed daily and compounded annually. Accordingly, post-judgment interest should be awarded from September 12, 1990 at the rate of 7.95% until paid in full, and computed daily and compounded annually.

Respectfully submitted this 8th day of August, 1994.

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No. 94-989

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAM BROWN COMPANY,
Petitioner,
v.
JACOBS MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE CASES JACOBS CITES, INCLUDING *CHATTEM, INC. v. BAILEY*, CONFIRM THE SHARP CONFLICT AMONG THE FEDERAL CIRCUITS WITH REGARD TO THE DATE FROM WHICH POSTJUDGMENT INTEREST RUNS.

Jacobs would have this Court believe that there is no conflict among the federal circuits concerning the proper legal standard for the allowance of postjudgment interest and that all the circuits apply essentially the same legal standard—one that confers on courts of appeals virtually

unfettered discretion to deny or allow interest on a case-by-case basis. One has only to read the relevant appellate decisions, however, to see that there is a profound conflict and that, contrary to Jacobs' assertion, the various circuits apply different and irreconcilable legal standards.

SBC is asking the Court to resolve this sharp conflict because it is a matter of substantial importance to the administration of justice. Specifically, what legal standard should a court of appeals apply when determining the date from which postjudgment interest runs upon reversal of an erroneous JAML (formerly judgment n.o.v.) and the reinstatement of an original jury verdict for money damages?

Some federal circuits, like the Second Circuit, suggest that appellate courts have very broad "discretion to decide the [computation of interest] issue on a case-by-case basis," depending essentially on the evidentiary facts and circumstances. *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 473 (2d Cir. 1988). But other circuits apply very different legal standards, ones that presume that such interest ordinarily runs from the date of the original judgment. *See, DeLong Equipment v. Washington Mills Electro*, 997 F.2d 1340 (11th Cir. 1993), *cert. denied*, 510 U.S. ——, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993) [on an unrelated issue]; *Cordero v. De Jesus-Mendez*, 922 F.2d 11 (1st Cir. 1990). Indeed, the Eleventh Circuit held that, when a judgment n.o.v. is reversed and a jury verdict is reinstated, absent an award of postjudgment interest from the date of the original money judgment, the integrity of the verdict would be impugned, and its value diminished, with serious Seventh Amendment implications. *DeLong*, 997 F.2d at 1342.

Chattem, Inc. v. Bailey, 838 F.2d 149 (6th Cir. 1988), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988), which Jacobs cites, only underscores the conflict among the circuits. Resp. Br. 7, 12. In his dissent to the Court's denial of certiorari, Justice White noted

in *Chattem*, 486 U.S. at 1059, 108 S.Ct. at 2831, 100 L.Ed.2d at 931-932:

> The question here is . . . what date should be used when calculating an award of postjudgment interest: the date of the first judgment for the plaintiff or the date of the later award?
>
> . . .
>
> *Because this case presents a conflict among the Circuits over the proper application of an oft-used federal statute (28 USC § 1961 [28 USCS § 1961]), I would grant the petition for certiorari.* Italics supplied.

Unlike this case, *Chattem* involved a much more complicated procedural history. In *Chattem* there was an initial judgment for $400,000 entered after a jury verdict, *not* a judgment n.o.v., that was reversed on appeal. After a new jury trial, a larger second jury verdict was returned, one for $650,000, that was later affirmed. Although the appellate court affirmed the district court's allowance of postjudgment interest on the first $400,000 from the date of the original judgment, it directed that interest on the remainder be computed from the date of the judgment entered after the second jury trial. Clearly, the denial of certiorari in *Chattem* is of no precedential value, not to mention the entirely different circumstances that were involved. *See, Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-918, 70 S.Ct. 252, 254-255, 94 L.Ed. 562, 565-566 (1950). It could have been for any number of reasons unrelated to the merit of the issues, including the fact that a convoluted procedural history was presented, one involving two separate jury trials that resulted in different monetary awards.

Just as Justice White confirmed the irreconcilable conflict among the federal circuits in *Chattem*, so too do the other cases cited by Jacobs. For example, contrary to the Fifth Circuit in *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986), the Third Cir-

cuit stated in *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 98 (3rd Cir. 1993):

> [I]f the original judgment is affirmed in whole, *such as where the court of appeals reverses the district court's grant of judgment n.o.v. and orders the original judgment reinstated in its entirety*, postjudgment interest *will* accrue from the date of the first judgment. *See, e.g., Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988). Italics supplied.

Jacobs mischaracterizes *Loughman*, just as it does *DeLong Equipment v. Washington Mills Electro, supra*, 997 F.2d 1340, when it insists there is no conflict among the circuits. Resp. Br. 11. If there were, it would no doubt come as a shock to the Eleventh Circuit, which ruled in *DeLong, id.* at 1343:

> *Having held that the jury's verdict was supported by the evidence, we will not undermine it by refusing to grant DeLong the interest necessary to sustain its value. To the extent that the Affiliated Capital case is inconsistent with this view, we disagree with it.* While Rule 37 allows an appellate court to select an appropriate date from which interest should run, we do not think this power would allow us, *in a case reinstating a jury verdict on grounds that the jury was correct*, to refuse to grant interest from the date judgment would have been entered in the plaintiff's favor if the district court had not erred. Italics supplied.

Quoting *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985) out of context, Jacobs insists (Resp. Br. 15) that *Buck* and *Affiliated* are consistent when in fact they are irreconcilable. Contrary to Jacobs' suggestion, "[t]he equities of the situation" referred to in *Buck*, 768 F.2d at 287, had nothing to do with the evidentairy record at all, only the *procedural* posture of the case. As the *Buck* court stated in the two sentences immediately preceding Jacobs' misleading quotation, 768 F.2d at 286:

> "Where judgment is entered promptly on the verdict, section 1961 ensures . . . that the plaintiff is compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant." . . . When the initial ascertainment of damages is upheld, as in this case, by the reversal of a judgment n.o.v., "but a delay occurs between the date of that ascertainment and the date of the eventual entry of judgment based on that ascertainment, the result [under section 1961] should not differ."

In essence Jacobs argues, since the Court of Appeals reinstated a jury verdict in SBC's favor that included punitive as well as compensatory damages, that a court of appeals should have "discretion" to deny postjudgment interest without giving any reason or including any instructions whatever in its mandate with respect to the allowance of interest. What Jacobs fails to explain is why.

Had the district court not erred in granting Jacobs' motion for JAML, and SBC's original money judgment been affirmed which of course it would have been, even Jacobs admits (Resp. Br. 8) that 28 U.S.C. § 1961(a) would have required the assessment of postjudgment interest from the date of SBC's original money judgment, September 12, 1990, *not* October 25, 1994, the date that SBC's jury verdict was reinstated and a second money judgment was entered for *precisely* the same amount pursuant to the Eighth Circuit's Mandate. Here the district court committed error and was reversed outright. And yet, only because of the Eighth Circuit's flawed Mandate, SBC has been stripped of $2 million in postjudgment interest without even an explanation why.

There simply can be no doubt that if the question presented had been decided in the First, Seventh, Eleventh or, until now, even the Eighth Circuit, this never could have happened. The reason is plain. "In cases such as this one, which reinstate a jury verdict . . . equity ordinarily, *and perhaps always*, commands that interest be

awarded from the date of the original judgment" in order "to protect the integrity of [a] jury verdict" and thus avoid what "might [otherwise be] a serious Seventh Amendment claim." *DeLong Equipment v. Washington Mills Electro*, 997 F.2d at 1341.*

II. THIS COURT SHOULD REQUIRE A COURT OF APPEALS TO INCLUDE EXPLICIT INSTRUCTIONS IN ITS MANDATE WITH RESPECT TO THE ALLOWANCE OF INTEREST, A QUESTION JACOBS FAILS TO ADDRESS, UPON REVERSAL OF A DISTRICT COURT AND REINSTATEMENT OF A JURY VERDICT AWARDING MONEY DAMAGES.

Jacobs fails even to address the other question presented by SBC's Petition, namely, whether upon timely motion an appellate court *must* amend its mandate to *explicitly* include instructions with respect to the allowance of interest. The Court of Appeals here, as even Jacobs concedes, "declin[ed] to amend its mandate" (Resp. Br. 11), even though F.R.A.P. Rule 37, 28 U.S.C.A., affirmatively commands that "[i]f a judgment is . . . reversed . . ., the mandate *shall* contain instructions with respect to the allowance of interest." Resp. Br. 2. Jacobs' silence on this unresolved issue speaks volumes.

Even were this Court to embrace the broad discretionary standard for postjudgment interest that Jacobs argues, the fact remains that the Eighth Circuit failed, even upon SBC's timely motion, to comply with Rule 37. Thus, its one-line Order denying SBC's motion to amend its Mandate, no reason given, not only impugns "the integrity of [a] jury verdict," to paraphrase *DeLong*, but makes it

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* Even before *DeLong*, where less than two years ago the Eleventh Circuit rejected the Fifth Circuit's view in *Affiliated*, another case cited by Jacobs acknowledged the sharp conflict among the circuits. *See, Brown & Williamson Tobacco Corp. v. Jacobson*, 9 Fed.R.Serv. 3d 630, 631-632, —— F.2d —— (7th Cir. 1987).

plain that SBC has "a serious Seventh Amendment claim," *id.* 997 F.2d at 1342, that only this Court can resolve.

CONCLUSION

For all of the reasons stated in SBC's Petition and this Reply, a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be issued.

Respectfully submitted,

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